Supreme Court, U.S.
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92-506

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHEVRON TRANSPORT CORPORATION and
CHEVRON SHIPPING COMPANY,
Petitioners,

versus

GREAT LAKES DREDGE & DOCK COMPANY,
Respondent.

Petition Of Chevron Transport Corporation And Chevron Shipping Company For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, in admiralty, a tortfeasor who settles with the plaintiff and is released from further liability is immune from a claim for contribution by another tortfeasor.

LIST OF PARTIES

The following companies are parties to the proceeding sought to be reviewed: Petitioners, Chevron Transport Corporation and Chevron Shipping Company, and Respondent, Great Lakes Dredge & Dock Company. The following companies are related to the parties: Chevron U.S.A., Intel, Inc., Chevron, Inc. f/k/a Standard Oil of California, and Great Lakes International, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
REFERENCE TO OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THIS PETITION	7
CONCLUSION	16

TABLE OF AUTHORITIES

CASES: Page

Associated Elec. Co op. v. Mid-America Transp. Co., 931 F.2d 1266 (8th Cir. 1991) 11,12

Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974) 7,8,9,10,15

Doyle v. United States, 441 F.Supp. 701 (D.S.C. 1977) 11

Ebanks v. Great Lakes Dredge & Dock Co., 688 F.2d 716 (11th Cir. 1982) 4

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979) 5,8,9,11,15

Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller, 957 F.2d 1575 (11th Cir. 1992) 2,10,12,13,15

Hardy v. Gulf Oil Corp., 949 F.2d 826 (5th Cir. 1992) 12,13

Hernandez v. M/V Rajaan, 841 F.2d 582 (5th Cir.), *cert. denied*, 488 U.S. 981, 109 S.Ct. 530, 102 L.Ed.2d 562 (1988) 12

In Re Oil Spill by the Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992) 11,13,15

Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979) 5,10,11,12

Luke v. Signal Oil & Gas Co., 523 F.2d 1190 (5th Cir. 1975) 6

Market v. Chesny, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985) 9

Miller v. Christopher, 887 F.2d 902 (9th Cir. 1989) 10,11,12,13,14

Myers v. Griffin-Alexander Drilling Co., 910 F.2d 1252 (5th Cir. 1990) 12

Rollins v. Cenac Towing Co., Inc., 938 F.2d 599 (5th Cir. 1991) 12

Table of Authorities Continued

	Page
Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540 (11th Cir. 1987)	2,5,10,11,12
Stanley v. Bertram-Trojan, Inc., 781 F.Supp 218 (S.D.N.Y. 1991)	11,12
Teal v. Eagle Fleet, Inc., 933 F.2d 341 (5th Cir. 1991)	12
Texas Industries, Inc. v. Radcliff Materials, 451 U.S. 630, 101 S.Ct. 2061, (1981)	9
United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975)	7,8,10,12,15
Williams v. First Nat'l Bank of Pauls Valley, 216 U.S. 582, 30 S.Ct. 441, 54 L.Ed. 625 (1910)	9
OTHER:	
12 U.L.A. 57-58	14
12 U.L.A. 99-100	14
12 U.L.A. 99-100 (1975)	13
33 U.S.C. § 901 (1992)	8
Easterbook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & Econ. 331 (1980)	14
Landes & Posner, *The Economic Structure of Tort Law*, 201-15 (1987)	13,14
Restatement (Second) of Torts § 886A cmt. m (1977)	10
Shavel, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 Stan.L.Rev. 447 (1981)	14
Shavel, *Economic Analysis of Accident Law*, 164-67 (1987)	14
T. Schoenbaum, *Admiralty and Maritime Law* § 4-15 (1987 ed.)	11

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NO. ___

CHEVRON TRANSPORT CORPORATION and
CHEVRON SHIPPING COMPANY,
Petitioners,

versus

GREAT LAKES DREDGE & DOCK COMPANY,
Respondent.

Petition Of Chevron Transport Corporation And Chevron Shipping Company For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on April 16, 1992.

REFERENCE TO OPINIONS BELOW

The opinions below consist of the following (listed chronologically):

1. Opinion of December 1, 1987 of the United States Court of Appeals for the Eleventh Circuit, *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987). (Appendix Item 4).

2. Order dated April 16, 1990, of the United States District Court for the Middle District of Florida, Jacksonville Division. (Appendix Item 3).

3. Opinion of April 16, 1992 of the United States Court of Appeals for the Eleventh Circuit, *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir. 1992). (Appendix Item 2).

4. Order of June 23, 1992, denying Petition for Rehearing and Suggestion of Rehearing *en banc*. (Appendix Item 1).

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit sought to be reviewed in this case was entered on April 16, 1992. A timely petition for rehearing and suggestion for rehearing *en banc*, was denied on June 23, 1992. This petition for writ of certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On February 5, 1975, the M/V "ROBERT WATT MILLER," a tanker owned by Chevron Transport Corp. and managed by Chevron Shipping Corp. (collectively "Chevron"), collided with a dredge owned by Great Lakes Dredge & Dock Co. ("Great Lakes") in the St. Johns River, in Jacksonville, Florida. The

dredge was called the "ALASKA." Eight crew members aboard the dredge were injured, and two others were killed.

Each of the crew members filed suit in admiralty against Great Lakes under the Jones Act and general maritime law. They also sued Chevron. Great Lakes in turn filed third-party complaints against Chevron for indemnity and/or contribution for any sums which Great Lakes might become liable to pay on account of the personal injury and death claims.

Chevron settled all of the personal injury and death claims brought against it for the total sum of $707,800, the last of such settlements being entered into on May 29, 1979. Chevron obtained full and complete releases from each of the claimants for any injuries, damages and/or claims sustained by them arising out of the collision. Each of the settlements was approved by the district court after notice to Great Lakes and discharged Chevron from any other or further liability to the claimants arising out of the collision.

Great Lakes declined to settle the claims against it. Those claims, and certain additional claims for punitive damages for Great Lakes' alleged violation of various safety regulations, were tried to a jury in Jacksonville, Florida, on June 1, 1979. Chevron was not a party to the trial. The court had severed the third-party actions against Chevron for trial at a later date.

At the trial, the jury found that Great Lakes had been negligent; however, its negligence was determined not to have been a proximate cause of the claimants' losses. The jury found Chevron 100% at

fault in the collision. The seamen appealed, and for the reasons set forth in *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982), the Eleventh Circuit reversed, and remanded the case for a new trial. On remand, the trial court consolidated for non-jury trial all pending actions, including Great Lakes' third-party claims for indemnity and/or contribution against Chevron.

The second trial began January 28, 1985. By that time Great Lakes had settled with all the claimants, except Vivian Marie Self, the personal representative of the estate of Danny Joe Self. In addition, the district court had granted Chevron a partial summary judgment on Great Lakes' indemnity claim on the ground that, there being no contractual or other special relationship between Great Lakes and Chevron, Great Lakes was not entitled to indemnity as a matter of law.

At the second trial, Self's claims against Great Lakes were tried as well as the liability issues between Great Lakes and Chevron. Self argued that Great Lakes recklessly failed to comply with numerous safety regulations, entitling her to punitive damages. Self and Chevron contended that Great Lakes improperly positioned the "ALASKA" and its attendant barge in the channel. Great Lakes alleged that Chevron negligently allowed the M/V "ROBERT WATT MILLER" to proceed through the channel with insufficient information about the location of the dredge and barge. Evidence on these and other claims were presented at trial.

Following presentation of the evidence, the trial court concluded Great Lakes was 30% responsible and Chevron was 70% responsible for the collision. The

court, however, made no finding regarding each tortfeasors' proportionate liability for the seaman's injuries. In other words, it made no finding as the whether Self's death was due to Chevron's tanker striking the dredge or Great Lakes' failure to have adequate life saving equipment aboard the "ALASKA." The court found Self's total damages to be $661,354.00. Relying on *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), the court held that Self, who had already settled with Chevron for $315,000, was only entitled to recover a 30% *pro rata* share of her total damages from Great Lakes. The court awarded Self a judgment of $198,406.20 against Great Lakes.

After the entry of the judgment, all three parties—Self, Chevron and Great Lakes—appealed. The Eleventh Circuit affirmed in part, reversed in part, and remanded in *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987). Specifically, the court affirmed, inter alia, the partial summary judgment granted to Chevron on Great Lakes' indemnity claim but reversed the trial court's award of damages to Self, rejecting the court's application of *Leger's* pro rata formula as inconsistent with the principles of joint and several liability discussed by this Court in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), a case which post-dated *Leger*. The appellate court held that the tortfeasors, rather than the innocent plaintiff, should bear the risks associated with settlement. It held Self could recover the full amount of her damages from Great Lakes on a *pro tanto* basis; that is, she could recover the total amount of her damages from Great Lakes, regardless of its percentage of fault in causing the collision, with an

appropriate dollar-for-dollar set-off for the settlement sums paid by Chevron. The court also stated that Chevron's court-approved settlements barred Great Lakes' claims for contribution under the rule laid down in *Luke v. Signal Oil & Gas Co.*, 523 F.2d 1190 (5th Cir. 1975). The case was remanded for a new trial on damages, including Self's claims for punitive damages.

A third trial on Self's damages was never held. After the Eleventh Circuit rendered its opinion in *Self*, Great Lakes settled with Vivian Marie Self for $2,050,000 on April 25, 1988. The settlement brought the total amount of money paid by Great Lakes in settlement of the claims of its crew members to $2,993,199. None of the death and personal injury claims against Great Lakes thus were ever adjudicated; rather, they were all settled voluntarily with no judicial determination as to liability or damage.

After the settlement with Self, Great Lakes turned its attention to its pending claims for contribution against Chevron. The district court entered summary judgment in favor of Chevron on the contribution claims on April 16, 1990. Relying on the Eleventh Circuit's adoption in *Self* of *Luke's* settlement bar rule, the court held that Chevron's settlements barred the contribution claims of Great Lakes. The district court further held that even if Great Lakes was entitled to recover contribution from Chevron, determining the amount of such an award, as a practical matter, would be an impossible task as both parties had settled voluntarily with the claimants. Great Lakes appealed.

On April 16, 1992, the Eleventh Circuit reversed, rejecting as dicta that portion of *Self* adopting the

settlement bar rule. It followed as binding precedent, however, *Self's* adoption of the *pro tanto* damage calculation formula. The court remanded, leaving to the district court the task of determining again whether the parties' proportionate liability for the claimant's damages, as well as the quantum of those damages, could be determined after 17 years of litigation. Chevron sought reconsideration of the court's decision, but its petition was denied.

REASONS FOR GRANTING THIS PETITION

The problem of allocating damages between settling and non-settling tortfeasors has deeply divided the courts of admiralty. The opinion below further widens this conflict by allowing, for the first time, a claim for contribution by one settling tortfeasor against another settling tortfeasor merely because one of them might have paid more in settlement than his adjudicated share of the damages would have been at trial. The source of this conflict may be traced to three recent decisions of the Court which laid down broad policy directives for loss allocation among maritime tortfeasors, but did not consider the policy of promoting settlements in this context.

This Court began the development of a modern framework for allocating responsibility among concurrent maritime tortfeasors in *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974). There the Court recognized the right of a tortfeasor to seek contribution against a joint tortfeasor where only one of them has been sued by the plaintiff and neither is statutorily immune from liability. Later in *United States v. Re-*

liable Transfer Co., Inc., 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975), the ancient maritime rule of divided damages applicable to collisions was abrogated in favor of a comparative fault system in which liability is apportioned according to each tortfeasor's degree of fault for causing the collision.

Finally, in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979), the Court held that an injured longshoreman whose negligent employer was statutorily immune from liability could proceed against the negligent vessel owner and recover all of his damages not caused by his own contributory fault.[1] The vessel owner in *Edmonds* was ultimately held liable for 90% of the longshoreman's damages even though he was only 20% at fault and could not seek contribution from the employer. *Edmonds* was premised on the majority's view that Congress, in enacting the 1972 amendments to the Longshoremen and Harbor Workers' Act,[2] contemplated application of principles of joint and several liability under which a tort victim may proceed to recover all of his damages against either of the responsible parties. *Id.* 443 U.S. at 270-71, 99 S.Ct. 2761-62.

Cooper and *Reliable Transfer* expressed the desirability of the comparative fault system where both wrongdoers are before the trial court and no countervailing considerations justify disparity between their liability and their relative fault. *Reliable Transfer*, 421 U.S. at 409, 95 S.Ct. at 1715; *Cooper*, 417

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[1] The longshoreman was found negligent in causing 10% of his own damages. *Id.* 443 U.S. at 256, 99 S.Ct. at 2754.

[2] 33 U.S.C. § 901 (1992) *et seq.*

U.S. at 113, 94 S.Ct. at 2178. *Edmonds*, on the other hand, emphasized the goal of ensuring the victim's full recovery as an overriding consideration which justified deviating from comparative fault principles and imposing disproportionate liability on the tortfeasors. *Edmonds*, 443 U.S. at 270, 99 S.Ct. at 2761.

Cases involving settlements between the plaintiff and one of the tortfeasors implicate an additional consideration. Any loss allocation scheme which exposes a settling defendant to further potential liability or continued litigation will have a serious adverse impact on settlements. *See, Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630, 637, 101 S.Ct. 2061, 2065 (1981) (declining to rule on availability of a right of contribution in antitrust cases for want of jurisdiction). Although this Court has long recognized the strong policy of promoting settlements, *see, e.g., Williams v. First Nat'l Bank of Pauls Valley*, 216 U.S. 582, 595, 30 S.Ct. 441, 445, 54 L.Ed. 625 (1910); *Market v. Chesny*, 473 U.S. 1, 10, 105 S.Ct. 3012, 3017, 87 L.Ed.2d 1 (1985), it has never defined the relative weight that this policy should be accorded in cases involving concurrent tortfeasors.

Lacking guidance from this Court, the federal appellate courts have been left with the task of harmonizing these competing considerations. They have formulated three conflicting approaches:

> (1) Awarding the plaintiff his full damages against the non-settling tortfeasor (less the sum he received in settlement) and allowing an action for contribution against a settling tortfeasor by any other tortfeasor who has paid more than his equitable share of the plaintiff's claim;

> (2) Awarding plaintiff his full damages in the same manner as in approach one *but* imposing a bar to contribution claims against a settling tortfeasor, perhaps in conjunction with a requirement that the settlement be in "good faith," and
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> (3) Reducing the claim of the plaintiff by the pro rata share of a settling tortfeasor's liability for damages, which has the effect of eliminating any reason to sue a settling tortfeasor for contribution.

See, Great Lakes Dredge & Dock Co. v. Tanker R.W. Miller, 957 F.2d 1575, 1581 (11th Cir. 1992) (citing *Miller v. Christopher*, 887 F.2d 902, 905 (9th Cir. 1989), (citing, *Restatement (Second) of Torts* § 886A cmt. m (1977))). Each approach is imperfect. The first approach seriously discourages settlements by exposing the settling tortfeasor to further liability and continued litigation. *Miller*, 887 F.2d 907. The second approach could leave a non-settling tortfeasor paying a higher or lower amount than his proportionate share of the damages. *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1547 (11th Cir. 1987). The third approach potentially deprives the plaintiff of full compensation for his damages by limiting his recovery against the non-settling tortfeasor. *Id.* at 1546.

The former Fifth Circuit was the first appellate court to consider these alternatives in light of *Cooper* and *Reliable Transfer*. In *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), the court adopted the third approach—reasoning that the goal of promoting settlements and the comparative fault principles expressed in *Reliable Transfer* mandated this result. *Id.* at 1249, 1250-51 ("Whether the

plaintiff or any of the defendants are ultimately found to have made a favorable settlement, we will 'respect the aleatory nature of the settlement process. . . .'").

Edmonds was decided two months after the opinion in *Leger* was rendered. Revisiting this issue in light of *Edmonds*, the Eleventh Circuit overruled *Leger* and adopted the second approach. *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987). The court acknowledged that the second approach could result in disparity between a tortfeasor's degree of fault and its share of the liability, but noted that "[t]he philosophy governing *Edmonds* is clear: any inequity which results from the implementation of a seaman's damage award should be borne by the tortfeasors rather than by the seaman himself." *Id.* at 1546.

Other circuits have had equal difficulty in balancing the competing policies concerned in cases involving settling tortfeasors. *See, Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989) (rejecting the first approach but not taking a position between the second and third approaches); *Associated Elec. Coop. v. Mid-America Transp. Co.*, 931 F.2d 1266 (8th Cir. 1991) (adopting the third approach); *In Re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992) (rejecting the third approach but not deciding between the first and second approaches); *Stanley v. Bertram-Trojan, Inc.*, 781 F.Supp 218, 223 (S.D.N.Y. 1991) (implementing the second approach); *Doyle v. United States*, 441 F.Supp. 701, 710-13 (D.S.C. 1977) (endorsing the third approach); *see also*, T. Schoenbaum, *Admiralty and Maritime Law* § 4-15, at 153-54 (1987 ed.) (endorsing the third approach). Even within the Fifth

Circuit, different panels have diverged—some continuing to adhere to *Leger*,[3] while others have followed *Self* and implemented the second approach.[4]

Until the Eleventh Circuit's most recent decision in this case, however, there was uniformity among the maritime circuits in rejecting the first approach and barring contribution against settling tortfeasors. *Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 836 (5th Cir. 1992); *Miller* 887 F.2d at 907; *Associated Elec.*, 931 F.2d at 1271; *Self*, 832 F.2d at 1547; *Stanley v. Bertram-Trojan, Inc.*, 781 F.Supp 218, 223 (S.D.N.Y. 1991) ("In choosing among these three imperfect solutions, the circuits agree that because of the strong policy in favor of settlement a tortfeasor with which a good faith settlement is reached is immune from suits for contribution.").

Extending the conflict to a new level, the Eleventh Circuit has now adopted the first approach. *Great Lakes*, 957 F.2d 1575, 1582-83. The court suggested that its earlier opinion in *Self* overlooked the mandate of *Reliable Transfer* and its express policy of ensuring that no tortfeasor is forced to pay more than its share of the damages: "The public policy underlying the quest for a 'just and equitable' allocation of damages is not eroded by the fact that the party from whom

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[3] *See, Teal v. Eagle Fleet, Inc.*, 933 F.2d 341 (5th Cir. 1991).

[4] *See, Hernandez v. M/V Rajaan*, 841 F.2d 582 (5th Cir.), *cert. denied*, 488 U.S. 981, 109 S.Ct. 530, 102 L.Ed.2d 562 (1988) (following the reasoning in *Self*, 832 F.2d 1540); *Rollins v. Cenac Towing Co., Inc.*, 938 F.2d 599, 600 (5th Cir. 1991); *Myers v. Griffin-Alexander Drilling Co.*, 910 F.2d 1252, 1256 (5th Cir. 1990).

contribution is sought has settled with the victim." *Great Lakes* at 1581-82. Based on this philosophy, the court allowed an action for contribution even though in this case both defendants have settled, there has been no judicial determination of the plaintiffs' damages or the defendants' relative degrees of fault, and there is no indication that either defendant paid more or less than its proportionate share of the damages. *Id.* at 1584 n.5. In reaching this decision, the court refused to acknowledge that the policy in favor of settlements is even implicated in this context. *Id.* at 1582 ("Assuming, *arguendo*, that rejecting the settlement bar rule has a slight disincentive effect upon settlements, we nevertheless authorize an action for contribution").

No other circuit is in agreement with the Eleventh Circuit's gross under-estimation of the adverse effect of contribution on settlements. *See e.g. Miller* 887 F.2d at 907 ("No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party." (quoting 12 U.L.A. 99-100 (1975))); *Amoco Cadiz*, 954 F.2d at 1317 (Under the contribution rule, "there is competition not to settle—for a settling defendant pays cash with certainty but does not buy peace."); *Hardy*, 949 F.2d at 836 (5th Cir. 1992) (allowing contribution against a settling tortfeasor "would, among other things, shatter the traditional finality of settlements"). Commentators have also recognized that the prospects of continued litigation and exposure to liability after settlement would remove a defendant's only incentives to settle. *See*, Landes & Posner, *The Economic Structure of Tort Law*, 201-15 (1987);

Shavel, *Economic Analysis of Accident Law* 164-67 (1987); Easterbook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & Econ. 331 (1980); Shavel, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 Stan. L. Rev. 447 (1981).

The experience of states is ample testimony to this point. The original version of the Uniform Contribution Among Tortfeasors Act ("UCATA"), drafted in 1939, adopted the first approach and allowed a claim for contribution against settling tortfeasors. 12 U.L.A. 57-58, §4. This approach was abandoned in the 1955 version of the UCATA because of its adverse impact on settlements. 12 U.L.A. 99-100. The Commissioner's Comment to the 1955 version described the consequences of the first approach in states which adopted it:

> The effect of section 5 of the 1939 Act has been to discourage settlements in joint tort cases, by making it impossible for one tortfeasor alone to take a release and close the file . . . Some reports go so far as to say that the 1939 Act has made independent settlements impossible. Many of the complaints come from plaintiff's attorneys, who say that they can no longer settle cases with one tortfeasor. Such reports have reached other states, and have been responsible for a considerable part of the opposition to the 1939 Act. . . .

12 U.L.A. 99-100, *quoted in, Miller*, 887 F.2d 907.

Delayed relief to the injured victim and the cost to society of unnecessarily protracted litigation are the

obvious corollaries of deterring settlements. The latter effect will be even further exacerbated by the Eleventh Circuit's broad holding that contribution is available even where both tortfeasors have settled with the plaintiff before trial. *Great Lakes*, 957 F.2d at 1583-84. This case is a prime example of the absurdity of this result. Seventeen years after the accident and following two inconclusive trials and appeals, Chevron and Great Lakes are being sent back to the dawn of this litigation to re-enact the personal injury and death trials and determine *if* either one of them paid more or less than its proportionate share of the damages. As the Seventh Circuit aptly commented in a similar context: "why should the judicial system invest so heavily in adjusting accounts among wrongdoers?" *Amoco Cadiz*, 954 F.2d at 318.

The opinion below underscores the need for this Court's guidance: it demonstrates that the confusion among courts of admiralty in this area will not be ameliorated or resolved through the passage of time. Time has only permitted those courts to explore the possible solutions to the problem in light of their own subjective notions of which competing policy deserves the greatest weight—further deepening the already hopeless conflict with each decision. *Cooper, Reliable Transfer* and *Edmonds* have meanwhile been construed to lend broad support for any formulation that the lower federal courts have elected to adopt as the law of their jurisdiction.

This Court should complete the development of a framework for loss allocation among concurrent maritime tortfeasors—a task it commenced with *Cooper*—by defining the consequence of settlement by one of

the tortfeasors. This case presents an appropriate context for such a decision.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to consider and bar a claim for contribution against a settling defendant in admiralty.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3466

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff-Appellant,

versus

TANKER ROBERT WATT MILLER,
Defendant-Appellee.

Complaint of CHEVRON TRANSPORT CORPORATION, as owner of the S/S ROBERT WATT MILLER, in an action for exoneration from or limitation of liability,
Plaintiff.

GREAT LAKES DREDGE & DOCK CO., a corporation,
Plaintiff-Appellant,

versus

CHEVRON SHIPPING COMPANY and
ITALIA SOCIETE PER AZ DI NAV.,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion April 16, 1992, 11th Cir., 19 ___ , ___ F.2d ___).
BEFORE COX and DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

//s//
UNITED STATES CIRCUIT JUDGE

GREAT LAKES DREDGE & DOCK COMPANY, Plaintiff-Appellant,

v.

TANKER ROBERT WATT MILLER, Defendant-Appellee.

Complaint of CHEVRON TRANSPORT CORPORATION, as owner of the S/S ROBERT WATT MILLER, in an action for exoneration from or limitation of liability, Plaintiff.

GREAT LAKES DREDGE & DOCK CO., a corporation, Plaintiff-Appellant,

v.

CHEVRON SHIPPING COMPANY and Italia Societe Per Az Di Nav., Defendants-Appellees.

No. 90-3466.

United States Court of Appeals, Eleventh Circuit.

April 16, 1992.

Owner of dredge sought contribution from owner of tanker for amounts paid to dredge's crewmen and estates of dredge's crewmen for personal injuries and deaths caused in collision between dredge and tanker. The United States District Court for the Middle District of Florida, Nos. 75-87-CIV-J-12, 75-114-CIV-J-12, 77-635-CIV-J-12, Howell W. Melton, J., entered summary judgment in favor of tanker owner, and dredge owner appealed. The Court of Appeals, Cox, Circuit Judge, held that: (1) tanker owner's settlement with crewmen and estates did not bar dredge owner's contribution claim, and (2) dredge owner's contribution claim was not barred by fact that it settled with crewmen and estates itself.

Reversed and remanded.

Courtney Wilder Stanton, Jacksonville, Fla., John Michael Kops, Warren M. Faris, John M. Futrell, New Orleans, La., for plaintiff-appellant.

G. Morton Good, Henry H. Bolz, Miami, Fla., Allen Vlcek, Sullivan & Vlcek, Jacksonville, Fla., for defendant-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before COX and DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

COX, Circuit Judge:

Great Lakes Dredge & Dock Co. ("Great Lakes") appeals the district court's grant of summary judgment in favor of Chevron Transport Corp. and Chevron Shipping Corp. (collectively referred to as "Chevron"). For the reasons discussed below, we reverse and remand.

I. Facts and Procedural Background

This appeal marks the third time this matter has come before this court. The background and facts of this case were extensively detailed by the district court in *In re Chevron Transport Corp.*, 613 F. Supp. 1428 (M.D. Fla. 1985), *aff'd in part and rev'd in part, Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), and by this court in *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083, 103 S.Ct. 1774, 76 L.Ed.2d 346 (1983), and *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed.2d 604 (1988). Accordingly, the following factual summary is limited to those issues currently before the court.

In February 1975, the *Robert Watt Miller*, a tanker owned by Chevron Transport Corp. and operated by Chev-

ron Shipping Corp., collided with the *Alaska*, a dredge owned by Great Lakes, in the St. Johns River near Jacksonville, Florida. As a result of the collision, eight crewmen of the *Alaska* were injured and two lost their lives.

The injured crewmen and the estates of the deceased filed separate suits against Great Lakes under the Jones Act and general maritime law. Great Lakes in turn filed third-party complaints against Chevron for contribution, indemnity, and damage to the *Alaska*. Meanwhile, Chevron settled with the injured crewmen and the estates of the deceased crewmen for a total of $707,800.

The district court severed the third-party claims against Chevron and tried before a jury the cases against Great Lakes. After a verdict was returned in favor of Great Lakes, the crewmen and estates appealed to this court. They argued that the district court erred in framing special interrogatories submitted to the jury. Those interrogatories asked the jury to determine the comparative degrees of fault of Great Lakes and Chevron, which was not a party to the suit. We reversed and remanded for a new trial, *Ebanks*, 688 F.2d at 722, saying:

> Since the plaintiff is entitled to recover, as stated by the Court, against either of several tortfeasors, without regard to the percentage of fault, it was error for the trial court to distract the juror's attention by requiring it to allocate the degree of fault between the defendant and a nonparty. If the jury had found the causation in the negligence which it found against Great Lakes, and Great Lakes considered that the total amount of damages for the injuries received by these plaintiffs was disproportionate for it to bear, it could have obtained contributions against Chevron, as it had already undertaken to do, in a different proceeding. That issue was to be tried at a different time and between two live oppo-

> nents, and not as part of the suit by the injured workman and representative of a deceased workman against their employer under the Jones Act.

Id.

After that decision, Great Lakes settled with all the claimants except the estate of Danny Self for a total of $943,199. The Self claim, brought by his widow Vivian Self, was then heard in conjunction with Great Lakes's claims against Chevron. The district court concluded that Great Lakes was 30% responsible and Chevron was 70% responsible. It also found Self's total damages to be $661,354. Because Self had already settled with Chevron (which was 70% responsible), the district court limited Self's recovery against Great Lakes to 30% of her damages or $198,406.

On appeal, this court rejected the district court's limitation of Self's recovery to the percentage of Great Lakes's fault. We held the district court's reliance on *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), for such a limitation was misplaced because that case was inconsistent with the principles of joint and several liability subsequently discussed by the Supreme Court in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979).[1] *Self*, 832 F.2d at 1545-48. We held that Self was entitled to recover her entire damages from Great Lakes, regardless of its percentage of fault, with a credit for the dollar amount ($315,000) of the settlement paid by Chevron, not a credit based upon Chevron's percentage of fault. *Id.* We also concluded that the district court underestimated the amount of Self's damages through faulty assumptions about her husband's pain and suffering and his future earnings potential. As a re-

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[1] The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

sult, Self was likely to recover far more than the $198,406 judgment entered by the district court.

Great Lakes subsequently settled with the Self estate for $2,050,000. The sole remaining issue was Great Lakes's claims for contribution from Chevron.[2] Great Lakes maintained that it was forced to pay far more than its proportionate share of all of the personal injury and wrongful death claims. The district court granted Chevron's motion for summary judgment on the contribution claims under the so-called "settlement bar" rule. The settlement bar rule prohibits one joint tortfeasor from seeking contribution from another joint tortfeasor who has settled with the injured party. The district court also held that Great Lakes's claims for contribution were barred because Great Lakes itself had settled with the personal injury and death claimants. Great Lakes appeals.

II. Issues on Appeal

Great Lakes contends that the district court erred in granting Chevron summary judgment on Great Lakes's contribution claims. Resolving this issue requires that we answer two questions:

1) Whether a settlement bar rule precludes a joint tortfeasor from seeking contribution from another joint tortfeasor who has settled with the injured party?

2) Whether, under what may be called a "settler barred" rule, a joint tortfeasor who has settled with the injured party may seek contribution from another joint tortfeasor?

III. Contentions of the Parties

Chevron argues that in *Self* this court held a settling joint tortfeasor is relieved of all further liability for con-

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[2] Chevron had been granted summary judgment on Great Lakes's claims for indemnity, and the parties had settled their claims for damages to the *Alaska* and the *Robert Watt Miller*.

tribution to other joint tortfeasors. The settlement bar rule, therefore, is both the law of this circuit and the law of the case. Chevron further argues that Great Lakes's claims for contribution are barred by Great Lakes's own settlement with the injured parties and the estates.

Great Lakes, on the other hand, contends that any discussion of the settlement bar rule in *Self* was dicta and not binding on the parties. Furthermore, adoption of a settlement bar rule is inconsistent with the Supreme Court's maritime precedent. Great Lakes also argues that Great Lakes's own settlement does not bar its action against Chevron for contribution.

IV. Standard of Review

[1] The district court's grant of summary judgment is subject to *de novo* review by this court. *See Shipes v. Hanover Ins. Co.*, 884 F.2d 1357 (11th Cir. 1989). Summary judgment is appropriate where there is no genuine issue of material fact and where the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

V. Discussion

A. The Law of the Case Doctrine

[2] This court's opinion in *Self* did indeed suggest that Great Lakes's action for contribution may be barred by Chevron's settlement with the injured parties. *Self*, 832 F.2d at 1547. This issue, however, was not before the court at that time. As we noted, "Great Lakes retained, of course, a right to contribution from Chevron .... In the case below, the district court granted partial summary judgment on the issue of indemnity, and left the possibility of contribution available. We affirm the district court on this point." *Id.* at 1556-57. Because the issue of contri-

bution and the settlement bar rule had not yet been resolved by the district court, the discussion in *Self* was dicta. As such, it is neither the law of the case nor binding precedent. We are therefore free to give that question fresh consideration.

B. Historical Background

[3] Before addressing the settlement bar question directly, it is necessary to briefly review the historical evolution of the law regarding distribution of liability among joint tortfeasors in maritime actions. At common law, contribution among joint tortfeasors was not recognized. In admiralty, however, a limited right to contribution has been recognized for more than 135 years. *See, e.g., The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170, 15 L.Ed. 233 (1855). Under the admiralty "divided damages" rule, if two vessels were both at fault for a collision, each was held responsible for one-half of the other vessel's damage. Although damages for the collision were shared among the joint tortfeasors, liability was not based on the parties' relative degrees of fault.

In 1974, the Supreme Court established the modern right to contribution among joint tortfeasors in maritime personal injury cases. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974). A year later, the Court abandoned the divided damages rule in collision cases and adopted a comparative negligence approach. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975). The Court held that liability should be distributed among the parties according to each party's comparative degree of fault. *Id.* at 411, 95 S.Ct. at 1715. The same proportionate fault rule applies in personal injury cases. *Id.* at 409, 95 S.Ct. at 1714.

A difficult problem arises in the personal injury context when one of the joint tortfeasors settles with the victim.

What effect should that settlement have on the liability of the remaining joint tortfeasors? It is generally agreed that non-settling joint tortfeasors are entitled to have a judgment against them reduced by the amount of any settlement. Otherwise, the injured party would receive a double recovery. There is a split of authority, however, over how to calculate the settlement credit. Some courts use a *pro rata* approach under which the non-settling joint tortfeasor receives a credit based upon the percentage of the settling party's fault. Other courts apply a *pro tanto* approach and give a credit for the actual dollar amount of the settlement. A simple hypothetical will demonstrate the effect of these two methods.

Assume, for example, that the negligence of A and B combine to injure C, who then files a lawsuit against A and B. On the morning of trial A settles with C for $50,000. The jury subsequently finds that A was 75% responsible[3] and B was 25% responsible for the accident and that C's damages totaled $100,000. If neither party had settled, judgment would be entered against A for $75,000 and B for $25,000. But given A's settlement for $50,000, how much should B pay? Under a *pro rata* approach, B would receive a credit for 75% of C's damages ($75,000) because A, the settling joint tortfeasor, was 75% responsible for the accident. Thus, B would owe $25,000 ($100,000-$75,000) to C. Under the *pro tanto* approach, B would only receive a credit for the dollar value of A's settlement ($50,000). Therefore, B would owe $50,000 ($100,000-$50,000) to C. Clearly, the manner in which the settlement credit is calculated has a significant effect.

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[3] The former Fifth Circuit noted in *Leger* that "potential joint tortfeasors who have settled may be joined under Rule 19 in order to assess pro rata damages." *Leger*, 592 F.2d at 1248 n. 3. *Cf. Ebanks*, 688 F.2d at 723 (holding that special interrogatory regarding comparative degree of fault between Great Lakes and Chevron was not appropriate where Chevron was not a party to the action).

Prior to *Cooper Stevedoring* and *Reliable Transfer*, courts generally applied the *pro tanto* approach. *See, e.g., Billiot v. Sewart Seacraft, Inc.*, 382 F.2d 662 (5th Cir. 1967). The former Fifth Circuit was the first appellate court to reconsider this issue in light of these Supreme Court decisions. In *Leger*, that court overruled *Billiot* and adopted the *pro rata* approach. "The reasoning of *Reliable Transfer* loses none of its cogency in the context of a non-collision personal injury case. Likewise, we can see no basis for rejecting the *Reliable Transfer* reasoning simply because one or more of the potential defendants has settled with the injured party." *Leger*, 592 F.2d at 1249. The court granted the non-settling defendant a credit based on the percentage of fault of the settling joint tortfeasor. The non-settling party, therefore, was forced to bear damages based upon its degree of fault.

It should be noted that the settling joint tortfeasor in *Leger* actually paid about $25,000 more than what its proportionate share of the damages would have been had it gone to trial. As a result, the plaintiff's compensation under the *pro rata* approach exceeded his actual damages as determined by the jury. The court rejected the non-settling defendant's argument that, by not using the *pro tanto* approach, the plaintiff was receiving a double recovery. The court held that the plaintiff merely made a favorable settlement and only recovered once for each tortfeasor's percentage of fault. *Id.* at 1250. It noted that both the plaintiff and the settling defendant chose to accept a fixed sum rather than to risk the uncertainty of a jury trial. "At the time of the settlement negotiations, no one knew how a jury would apportion fault or in what amount it would find damages. By settling with Continental and DWC, Leger took the risk that he was foregoing a larger amount possibly to be obtained at trial." *Id.*

Two months after the opinion in *Leger* was announced, the Supreme Court decided *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61

L.Ed.2d 521 (1979). In *Edmonds*, a longshoreman was injured in an accident for which the jury determined he was 10% at fault, his employer (via another employee's negligence) was 70% at fault, and the shipowner was 20% at fault. The longshoreman collected benefits from his employer under the Longshoremen's and Harbor Worker's Compensation Act (LHWCA), which provides statutory benefits in exchange for the loss of the right to sue the employer for negligence. The longshoreman filed suit against the shipowner. The jury found the longshoreman's total damages to be $100,000. The district court entered judgment against the shipowner for $90,000, which represented the $100,000 of damages less a 10% credit ($10,000) for the longshoreman's contributory negligence.

The shipowner argued that it should only be liable for $20,000, which is that portion of the damages attributable to its 20% fault. The Supreme Court, however, held that the Longshoremen's Act did not modify the pre-existing admiralty rule that a longshoreman may recover the full measure of his damages from a shipowner who is partially responsible for an accident. *Id.* at 266. Unfortunately for the shipowner, it was also barred by the exclusive remedy provision of the LHWCA from seeking contribution from the employer who was 70% responsible. The Court sympathized with the shipowner's argument that it was being forced to bear more than its fair share, concluding that "[s]ome inequity appears inevitable in the present statutory scheme, but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect." *Edmonds*, 443 U.S. at 270, 99 S.Ct. at 2761.

Citing *Edmonds* by analogy,[4] this court overruled *Leger's pro rata* approach and returned to the *pro tanto* method.

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[4] *Edmonds* clearly does not overrule *Leger* directly. *See, e.g., Self, 832 F.2d at 1546. In Leger*, the injured party voluntarily chose to settle

Self, 832 F.2d at 1548. The court candidly admitted that the *pro tanto* method may cause a joint tortfeasor to pay more damages than were actually caused by its proportionate share of fault. Nevertheless, "[t]he philosophy governing *Edmonds* is clear: any inequity which results from the implementation of a seaman's damage award should be borne by the tortfeasors rather than the seaman himself." *Id.* at 1546. This court concluded that the *Edmond*'s philosophy requires the non-settling joint tortfeasor to bear a disproportionate burden even when the "inequity" was caused by the seaman's own imprudent settlement with another joint tortfeasor for less than its fair share of the damages.

With this background in mind, we now turn to the central issue on this appeal: Whether, given the *pro tanto* method adopted in *Self*, a joint tortfeasor who is forced to bear more than its fair share of an injured party's damages is prohibited by a settlement bar rule from seeking contribution from a settling joint tortfeasor.

C. The Settlement Bar Rule

[4] The Ninth Circuit accurately summarized the confusion surrounding the maritime settlement bar rule in

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with one of the joint tortfeasors. The liability of the non-settling joint tortfeasor, therefore, was reduced proportionately. In *Edmonds*, on the other hand, the injured party was barred by the statutory scheme from suing his employer for full damages (in exchange for a guaranteed limited recovery regardless of fault). Accordingly, the victim was permitted to recover his entire damages from the shipowner which was partially responsible for the accident. The Eighth Circuit relied upon this distinction between a voluntary settlement and a statutory bar for holding that *Edmonds* did not overrule *Leger*. That court then compared the various methods for distributing liability among joint tortfeasors and concluded that "the *Leger* panel's proportional fault approach is the best . . . ." *Associated Electric Co-op. v. Mid-America Transportation Co.*, 931 F.2d 1266, 1271 (8th Cir. 1991). This court, however, is bound by its earlier decision in *Self*. *See, e.g., Robinson v. Tanner*, 798 F.2d 1378 (11th Cir. 1986), *cert. denied*, 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987).

Miller v. Christopher, 887 F.2d 902 (9th Cir. 1989). "We sympathize with the district court's difficulties in finding guidance from controlling authority on the settlement bar issue. There is none." *Id.* at 903. The court noted that there are three possible solutions to the question:

> (1) allowing an action for contribution against a settling tortfeasor by any other tortfeasor who has paid more than his equitable share of the plaintiff's claim;
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> (2) imposing a bar to contribution claims against a settling tortfeasor, perhaps in conjunction with a requirement that the settlement be in "good faith"; and
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> (3) reducing the claim of the plaintiff by the pro rata share of a settling tortfeasor's liability for damages, which has the effect of eliminating any reason to sue a settling tortfeasor for contribution.

Id. at 905 (citing Restatement (Second) of Torts § 886A cmt. m (1977)). Other circuits have failed to reach a consensus on this issue. *See, e.g., Associated Electric Co-op.*, 931 F.2d at 1266 (8th Cir. 1991) (adopting third approach); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992) (rejecting third approach but not deciding between first and second); *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989) (rejecting first approach but not deciding between the second and third). Of course, this same issue arises in tort law generally. The Restatement (Second) of Torts refuses to take a position on the issue. Restatement (Second) of Torts § 886A Caveat. The Restatement notes that each approach has drawbacks and that no one is satisfactory. *Id.* § 886A cmt. m.

Chevron argues, and the dicta in *Self* suggests, that this issue is controlled by *Luke v. Signal Oil & Gas Co.*, 523 F.2d 1190 (5th Cir. 1975). In *Luke*, the court held that

under Louisiana law joint tortfeasors lose their right of contribution against those tortfeasors who have settled with the plaintiff. *Id.* at 1191. This conclusion, however, was premised upon the fact that "since the plaintiff has deprived the unreleased tortfeasor of his right to enforce contribution, the amount recoverable against the unreleased tortfeasor is reduced *pro rata.*" *Id.* (emphasis added). The settlement bar rule applied in *Luke* was subsequently incorporated into the maritime proportionate liability scheme adopted in *Leger*. *See Leger*, 592 F.2d at 1248 n. 4; *see also Self*, 832 F.2d at 1547.

Self, however, overruled *Leger* and rejected the proportionate distribution of liability. Accordingly, the third approach described above is not available. This court, therefore, must choose between the first and second approaches—permitting an action for contribution or adopting some kind of settlement bar rule. Permitting contribution ensures that liability will be shared by all joint tortfeasors in proportion to their respective degrees of fault. Critics, however, argue that it may discourage settlements because the settling tortfeasor still faces litigation and potential liability to non-settling joint tortfeasors. Adopting a settlement bar rule, on the other hand, generally encourages at least partial settlements. Non-settling tortfeasors, however, may be forced to pay far more than their proportionate share of damages. Given the necessity of deciding between these two approaches, we select the former and reject the adoption of a settlement bar rule. *See Drake Towing Co. v. Meisner Marine Constr. Co.*, 765 F.2d 1060, 1068 (11th Cir. 1985) (holding implicitly that non-settling joint tortfeasor had right to contribution from settling tortfeasor); *see also Donovan v. Robbins*, 752 F.2d 1170, 1181 (7th Cir. 1985) (stating "traditional rule is that . . . a settlement does not limit the nonsettling defendants' right to contribution").

Permitting contribution is clearly supported by the Supreme Court's decision in *Reliable Transfer*. As dis-

cussed above, the Court in *Reliable Transfer* held that liability among joint tortfeasors in maritime actions should be distributed according to their comparative degree of fault. *Reliable Transfer*, 421 U.S. at 411, 95 S.Ct. at 1715-16. The public policy underlying this quest for a "just and equitable" allocation of damages is not eroded by the fact that the party from whom contribution is sought has settled with the victim. Requiring each party to bear that portion of the damages caused by its own negligence guarantees an efficient level of deterrence against future negligence. If a negligent party was forced to pay more or less than its fair share, future negligence would be either over- or under-deterred. *See, e.g., Smith & Kelly Co. v. The S/S Concordia Tadj*, 718 F.2d 1022, 1029-30 (11th Cir. 1983) (stating that "[t]he clear trend in maritime cases is to reject all-or-nothing or other arbitrary allotments of liability in favor of a system that divides damages on the basis of the relative degrees of fault" and that such a system "matches the power of its incentives to the ability of each party to prevent injury"); *Reliable Transfer*, 421 U.S. at 405 n. 11, 95 S.Ct. at 1713 (noting that comparative fault "imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others"). Allowing an action for contribution is also consistent with *Edmonds*. The injured party is assured of full compensation for his damages (less a deduction for any contributory negligence) and is unaffected by any subsequent action among the joint tortfeasors for contribution.

Chevron argues that allowing contribution will discourage settlements because the settling party may still face liability to the non-settling joint tortfeasors for contribution. The deterrent effect on settlements, however, is far from clearly established. See, e.g.,Unif.Comp.Fault Act § 6 cmt., 12 U.L.A. 55 (Supp. 1991) (stating that "[w]hile [the settlement bar rule] theoretically encourages settlements, it may be unfair to other defendants and if the good-faith requirement is conscientiously enforced settlement may be

discouraged."). Furthermore, the potential negative side effects of the settlement bar rule outweigh its purported advantage.

The *pro tanto* approach may encourage irresponsible settlements by plaintiffs. If we then apply a settlement bar rule, we force non-settling defendants to bear a disproportionate share of liability. When a single tortfeasor causes an injury and the parties settle, both the plaintiff and the defendant accept the certainty of a fixed result in exchange for forgoing the chance of a more favorable outcome at trial. The balancing of risk by both sides of the bargaining table ensures that the result is equitable. This, however, is not the case with multiple tortfeasors under the *pro tanto* approach. The plaintiff is free to accept the certainty of a settlement *without* losing the chance of obtaining more at trial. If it turns out that the plaintiff settled for too little from one defendant, he automatically recovers the shortfall from the non-settling defendants. *See supra* at 1579 (describing effect of the *pro tanto* approach). The normal balancing of risks by both sides is disrupted. *See, e.g., In re Oil Spill by the Amoco Cadiz*, 954 F.2d at 1314. The party who makes the decision relative to settlement is not the party who bears the responsibility for that decision. If we apply a settlement bar rule in this situation, the defendants will be unable to equitably divide liability among themselves. It will be the non-settling defendants, not the plaintiff or the settling defendant, who bear the risk that the plaintiff settled for too little.

Assuming, *arguendo*, that rejecting the settlement bar rule has a slight disincentive effect upon settlements, we nevertheless authorize an action for contribution. The Supreme Court came to a similar conclusion when it adopted the doctrine of comparative fault in *Reliable Transfer*. "[The argument against comparative fault] asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some lit-

igation." *Reliable Transfer*, 421 U.S. at 408, 95 S.Ct. at 1714; *see also Donovan*, 752 F.2d at 1181 (noting that a settlement bar rule may "encourage settlement, all right, but it would be contrary to the spirit of contribution, since it would allow guiltier defendants to get off cheaply by settling first").

For the reasons discussed above, therefore, we reject the settlement bar rule in admiralty. We hold that an action for contribution against a settling tortfeasor may be maintained by a non-settling joint tortfeasor that has paid more than its share of the plaintiff's damages based upon the respective degrees of fault.

D. The "Settler Barred" Rule

[5] Citing *Jovovich v. Desco Marine, Inc.*, 809 F.2d 1529 (11th Cir. 1987), Chevron also argues that Great Lakes's claims for contribution are prohibited by Great Lakes's own settlement with the injured crewmen and estates under what may be called a "settler barred" rule. In *Jovovich*, a seaman was injured when the rigging aboard his vessel failed, allegedly due to the combined fault of the vessel's master and designer and the equipment manufacturer. He sued the master of the vessel, whose insurance company settled for the policy limits of $300,000. The insurance company and the seaman then brought suit against the manufacturer of the equipment and the designer of the vessel. The insurance company, which sued on the behalf of the vessel's master, claimed a right to contribution or indemnity for its settlement if it was determined at trial that its settlement was greater than what its proportionate share of the judgment would have been had it not settled and gone to trial. *Jovovich*, 809 F.2d at 1530.

Under the proportionate liability scheme of *Leger*, this court held that the insurance company was not entitled to contribution. *Jovovich*, 809 F.2d at 1531. The insurance company had been free to assess its potential liability prior

to settlement. "The court in *Leger* held that settling parties assume the finality and potential benefit and risk of their settlement decision. . . ." *Id.* The fact that the insurance company might have settled its portion of liability unfavorably does not give it a right to contribution from the non-settling joint tortfeasors. *Id.*

Jovovich did not establish a broad "settler barred" rule. Rather, it merely noted that, given proportionate liability under *Leger*, the settling joint tortfeasor could not possibly be entitled to contribution. A claim for contribution presupposes that one is forced to pay more than one's proportionate share of damages. The insurance company in *Jovovich* merely settled its insured's portion of liability. The insured was not held liable for more than its fair share of the damages. The insurance company must bear the risk that it overestimated that share and settled for more than it would have been forced to pay had it gone to trial.

Jovovich is not controlling in the case at bar. As noted above, this court has rejected the *Leger* approach. Great Lakes, therefore, might well have been forced to pay far more than its proportionate share of damages. Accordingly, notwithstanding the fact that Great Lakes itself settled with the claimants, Great Lakes may be entitled to contribution from Chevron.

In *Wisconsin Barge Line, Inc. v. The Barge Chem 300*, 546 F.2d 1125 (5th Cir. 1977), a seaman sued his employer for injuries subsequently determined to have been caused by a third party. The employer requested that the third party defend the lawsuit, but the third party never responded. The employer then entered into a court approved settlement with the injured seaman for $32,419. In a separate action for indemnity from the third party, the third party claimed that the employer was not entitled to indemnification for its settlement. *Id.* at 1126.

The court rejected the third-party's argument that, absent a judgment, the employer was not required to pay the employee's damages. "[I]n the facts of the instant case, appellant's payment to the claimant could hardly be said to be 'voluntary' in the sense of there being no legal liability, with the result of foreclosing indemnification." *Id.* at 1129. The court held that the employer was entitled to indemnity for its settlement payment if the settlement amount was reasonable. *Id.* at 1130. We recently reiterated this principle in *Weissman v. Boating Magazine*, 946 F.2d 811 (11th Cir. 1991).

> [A] settling indemnitee can recover from an indemnitor upon proof of the indemnitee's potential liability if the settlement terms are reasonable and if the indemnitor has notice of the suit, and has failed to object to those terms even though he has had a reasonable opportunity to approve or disapprove the settlement.

Id. at 813 (quoting *Burke v. Ripp*, 619 F.2d 354, 360 (5th Cir. 1980)).

The doctrine which permitted indemnity despite settlement was extended to an action for contribution in *Adams v. Texaco, Inc.*, 640 F.2d 618 (5th Cir. 1981). In Adams, a negligent employer was entitled to recover contribution from a joint tortfeasor for maintenance and cure benefits paid to an injured seaman. *Id.* at 621. Citing *Wisconsin Barge Line*, the court specifically noted that "[the shipowner's] settlement with Adams does not affect Texaco's liability to proportionately reimburse [the shipowner] for its maintenance and cure payments." *Id.* at 621 n. 5. *See also Smith & Kelly*, 718 F.2d at 1030 (authorizing action for contribution by stevedore which had settled with injured seaman).

We also note that permitting Great Lakes's contribution action despite its settlement is consistent with *Reliable Transfer*. As discussed above, liability in maritime actions

should be distributed according to the parties' comparative degrees of fault. *Reliable Transfer*, 421 U.S. at 411, 95 S.Ct. at 1715. If Great Lakes paid more than its proportionate share, it might well be entitled to contribution from Chevron. We hold that Great Lakes's claims for contribution from Chevron are not barred by the fact that Great Lakes itself settled with the injured crewmen and estates. We do not address whether Great Lakes ultimately will be entitled to receive contribution from Chevron because the district court has not yet had an opportunity to decide this issue.[5]

VI. Conclusion

For the reasons discussed above, we reject both the settlement bar and "settler barred" rules in maritime actions for contribution under the *Self pro tanto* approach. The district court's grant of summary judgment in favor of Chevron on Great Lakes's claims for contribution is reversed. The case is remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED.

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[5] Chevron maintains that there has never been a judicial determination of the victim's damages or the relative degrees of fault between itself and Great Lakes and that the dollar value of the parties' settlements can not be equated since they occurred at different points in time. It suggests that the district court must, in effect, hold a new trial on all of the plaintiffs' claims in order to resolve Great Lakes's claims for contribution. Great Lakes, on the other hand, argues that the various settlements are presumptive proof of the victim's damages unless it is shown that the settlements were not reasonable. It further asserts that the district court has already determined the relative degrees of fault between Chevron (70%) and Great Lakes (30%) for the injuries. *See In re Chevron Transport Corp.*, 613 F. Supp. 1428 (M.D. Fla. 1985). We leave initial consideration of these issues to the district court on remand.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff,

vs.

TANKER ROBERT WATT MILLER,
Defendant.

Case No. 75-87-Civ-J-12

Complaint of CHEVRON TRANSPORT CORPORATION, as owner of the SS/ROBERT WATT MILLER, in an action for exoneration from or limitation of liability.

Case No. 75-114-Civ-J-12

GREAT LAKES DREDGE & DOCK CO.,
a corporation,
Plaintiff,

vs.

CHEVRON SHIPPING COMPANY and
ITALIA SOCIETE PER AZ DI NAV.,
Defendants.

Case No. 77-635-Civ-J-12

ORDER GRANTING CHEVRON'S MOTION FOR SUMMARY JUDGMENT

More than fifteen years after the collision of the Robert Watt Miller with the dredge Alaska and Barge GL 142 in

The Drummond Creek Range Channel of the St. Johns River, Jacksonville, Florida, the Court has squarely before it the last remaining issue arising out of the many lawsuits filed following the accident. Chevron Transport Corporation and Chevron Shipping Company (collectively "Chevron") filed their Motion for Summary Judgment on July 31, 1989; Great Lakes Dredge & Dock Company ("Great Lakes") filed its Motion for Partial Summary Judgment on August 10, 1989. The responses to these motions were filed, respectively, by Great Lakes on August 29, 1989, and Chevron on September 22, 1989. The Court heard the argument of counsel on March 14, 1990.

Chevron and Great Lakes debate at length the availability of contribution; that is, Great Lakes seeks contribution from Chevron because, Great Lakes contends, it paid a greater share in settlements with the injured parties than its adjudicated proportionate share of liability for the collision. Chevron argues that contribution is not available from a settling tortfeasor under maritime law. Both parties claim their arguments are supported by prior appellate court opinions dealing with the now-settled suits, *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982), and *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988).

In *Ebanks*, a panel of the Eleventh Circuit reversed this Court because the jury was allowed to consider the comparative fault of Chevron and Great Lakes when Chevron was not a participant in the trial. The appellate court found error in application of *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), under those circumstances. On remand, this Court, through a visiting judge, adjudicated the last remaining claim of a plaintiff other than Great Lakes or Chevron, this time consolidated with the liability actions between Great Lakes and Chevron. *See In re Chevron Transport Corp.*, 613 F. Supp. 1428 (M.D. Fla. 1985) (Daniel Holcomb Thomas, J., sitting by

designation). Consequent to and in addition to deciding damages in the claim of the Jones Act claimant, the Court apportioned liability between the joint tortfeasors, Chevron and Great Lakes, and applied *Leger* to adjust the damages against Great Lakes to reflect the settlement entered into by Chevron many years earlier. *See id.* at 1439.

In *Self* a panel of the Eleventh Circuit reversed on the damages issue once again. The appellate court disapproved of the reliance on *Leger* due to changes in the law since its decision and differences between the facts of that case and this case. *See id.* at 1545-48. The course of the court's discussion of *Leger* forms the basis for Chevron's argument that contribution is foreclosed in this case. For instance, the court notes a difference between the first and second trials in *Leger* and this case, observing

> at no time after the settlement did Self seek any further damages from Chevron. Under the principle announced in *Luke v. Signal Oil & Gas Co.*, 523 F.2d 1190 (5th Cir. 1975), contributions cannot be obtained by one tortfeasor from a tortfeasor who has settled with and been released by the claimant.

Id. at 1547. After additional discussion of distinctions between the cases and a statement of the court's holding, the *Self* opinion explains a potential impact of its holding, in these terms:

> We do not overlook the fact that in a case such as this, a joint tortfeasor may be left paying a higher or lower percentage of the damages than it caused. Nor do we overlook the rule that there may be joint contribution amongst tortfeasors in an admiralty case and that *in the absence of a settlement*, the amount of contribution turns on the percentage fault of each joint tortfeasor. *Leger* upheld that "settling defendants are re-

> lieved of any further liability to the plaintiff." It is obvious that the rule announced in *Luke* overrides the right of contribution.
>
> We acknowledge that the rule that we adopt today may cause disparity in the percentage of payment as between the settling and nonsettling tortfeasors in maritime personal injury actions. We note, however, that this court is not unique in adopting such a rule. Among those states that have incorporated comparative fault principles into their tort systems, *but have retained the rule that there is no contribution from settling tortfeasors*, there is a split of authority as to how a nonsettling tortfeasor's share of damages should be calculated. Some states have adopted the rule that *Leger* employed, while others require that the nonsettling tortfeasor's share be reduced only by the amount paid by a settling tortfeasor.
>
> As we are bound by the Supreme Court's guidance and the rule in *Edmonds*, we adopt the latter of these approaches.

Id. at 1547-48 (emphasis added, footnote and citations omitted, quotation from *Leger*, 592 F.2d at 1248).

The emphasized portions of the above-quoted portion of *Self* give strong support to Chevron's argument. The appellate court shaped the calculation of damages around the assumption that contribution from a settling tortfeasor would not be available. Other courts have placed Chevron's gloss of *Self*.[1] *See, e.g., Miller v. Christopher*, 887 F.2d

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[1] In addition to the cases cited by the Court, Chevron called attention to *Commercial Cleaning Corp. v. Allied Chemical Co.*, 254 Cal. Rptr. 401, 407-08, 1989 AMC 769, 778-80 (Cal. App. 1988), *rev. denied*, 254 Cal. Rptr. 401 (Cal. 1989). The court agrees that the discussion of contribution doctrine in *Commercial Cleaning* is enlightening; however, the California Supreme Court directed in its order denying review that

902, 905-06 (9th Cir. 1989); *In re Ocean Foods Boat Co.*, 1989 AMC 595, 596-97 (D. Or. 1988). Great Lakes suggests an alternative reading of *Self* that avoids the conclusion that the settlement bar rule was adopted by the Eleventh Circuit, but the Court finds Great Lakes' argument unconvincing.[2] Because the *Self* opinion delineates the law of

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the case should not be officially published. Under California law, "[a]n opinion that is not ordered published shall not be cited or relied on by a court or party in any action or proceeding . . . ." Ca. Ct. R. Misc. 977. This Court, therefore, recognizes the valuable commentary in this unofficially published opinion, but the Court respects the California Rules of Court by omitting the case citation from the main text of this order.

[2] Great Lakes notes language in *Ebanks*, 688 F.2d at 722, that suggests its right to contribution. The pertinent passage is plainly dicta and it is inconsistent with *Self*. *Ebanks* cannot rule as law of the case regarding the contribution issue because Chevron, a vitally interested party in the matter, was not a party to the appeal, because *Self* may be fairly read as a retreat from the language on which Great Lakes relies, and because application of the dicta would work a manifest injustice. *Cf. Dorsey v. Continental Casualty Co.*, 730 F.2d 675, 678 (11th Cir. 1984).

Self discusses contribution favorably in two related paragraphs concerning Great Lakes' claim for indemnity. The appellate court affirmed this Court's pretrial order granting Chevron's motion for summary judgment on Great Lakes' indemnity claim. In the course of affirming this Court's order, the appellate court remarks, "The district court rejected [Great Lakes'] argument [in support of indemnity]. Great Lakes retained, of course, a right to contribution from Chevron." 832 F.2d at 1556. In the next paragraph, following a discussion of relevant legal principles, the appellate court concludes, "the district court granted indemnity, and left the possibility of contribution available. We affirm the district court on this point." *Id.* at 1557. Great Lakes urges that these passages demonstrate appellate endorsement of the existence of its contribution claims.

The Court cannot concur in Great Lakes' reading of *Self*. The two passages, taken literally, contradict each other. The first passage appears to openly endorse a right of contribution; the second passage declares the issue unresolved. Instead, the Court reads these passages against the whole *Self* opinion and against the ruling from which the

the case, *see United States v. White*, 846 F.2d 678, 684 (11th Cir.) (law of the case includes all matters decided by necessary implication), *cert. denied*, 109 S.Ct. 537-38 (1988), and none of the recognized exceptions apply, this Court is duty bound to apply its mandate. *See, e.g., Litman v. Massachusetts Mutual Life Ins. Co.*, 825 F.2d 1506, 1510-11 (11th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 1006 (1988).

Arguably, the doctrine of contribution for partial settlements has no application in this case—regardless whether the rule allows or disallows contribution—inasmuch as the doctrine specifies the apportionment of liability between settling and nonsettling tortfeasors. Here, both tortfeasors settled. A rule for partial settlements does not by force of logic apply to total settlements; in fact, sound policy concerns militate against the extension of any rule that contemplates contribution between settling tortfeasors. The Court accordingly holds that the rule of damages crafted in *Self* bars contribution in this case if the principles applicable to partial settlements also apply to total settlements. The Court further holds that contribution is not available to Great Lakes if the principles applicable to total settlements differ.

The fundamental concern when partial settlement has been achieved is how to adjust the judicially-determined damages award against the nonsettling tortfeasors to re-

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appeal was taken. The portions of *Self* quoted in this order give confidence to the conclusion that contribution is not available. The order from which Great Lakes appealed had the limited scope of ruling on the indemnity claim; the contribution claims were not a part of the ruling and were not passed upon in this Court. (Use of the *Leger* method to calculate Self's damages from Great Lakes removed any need to consider the issue of contribution.) Thus, the appellate court's affirmance of the indemnity order did not decide any issue concerning contribution and this Court reads its opinion as leaving the matter to be resolved here, within the parameters of the discussion earlier in the *Self* opinion.

flect the amount of the settlements between plaintiffs and the settling tortfeasors. *See, e.g., Restatement (Second) of Torts* § 886A, comment *m* (1979); *Miller*, 887 F.2d at 905-06. Recognition of a right to contribution on behalf of nonsettling tortfeasors against settling tortfeasors is one of three generally accepted methods of apportioning damages between all those jointly and severally responsible when the nonsettling tortfeasors have incurred a judgment liability in excess of their adjudged proportion of fault for a plaintiff's damages. Contribution is an alternative to reducing the plaintiff's collectible damages by the amount of the settlements, or some figure derived therefrom. *See generally* Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 Iowa L. Rev. 533, 542-54 (1981); Comment, *A Dollars and Sense Approach to Partial Settlements: Judicial Application of the Gross Damages Method*, 72 Iowa L. Rev. 1147 (1987). Under a contribution regime, the court holds the nonsettling tortfeasor for the full amount of a plaintiff's damages and then that tortfeasor is left to pursue the settling tortfeasors for any amount in excess of the equitable share of the nonsettling tortfeasor's liability. The other two methods accomplish the same goal as contribution by setting off a nonsettling tortfeasor's ultimate liability for damages. *See Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 548 (D. Colo. 1989); *Young v. Latta*, 233 N.J. Super. 520, 559 A.2d 465, 467 (App. Div. 1989).

The prerequisites for contribution, then, include a judicial allocation of liability between tortfeasors and a judicial determination of a plaintiff's damages. *See Tefft v. Tefft*, 192 N.J. Super. 561, 471 A.2d 790, 795 (App. Div. 1983) (finding three prerequisites: entry of judgment or verdict, determination of plaintiff's quantum of damages, and existence of nonsettling defendants). While Great Lakes has an arguable basis for asserting that the first of these prerequisites has been satisfied,[3] the total settle-

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[3] Chevron raises several arguments in opposition to the proposition

ment of all claims left the parties without a judicial measure of damages. Great Lakes would solve this problem by using the figures at which it (and Chevron) settled the bodily injury and loss-of-life claims, with "a reduction to a common value of all payments made by Great Lakes and, possibly, a contest as to the reasonable value for contribution purposes of one or two of the settlements." Great Lakes' Memorandum in Support of Motion for Partial Summary Judgment, at 2 n.1.

Great Lakes proceeds from a flawed premise. Settlement figures lack equivalence to judicially-determined damages and to each other. Settlement is a process of discounting the benefit that may be derived or the liability that may be incurred in a lawsuit by the cost of litigation. *See, e.g., Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1230 (9th Cir. 1989). Litigants consider a variety of factors, unrelated to the extent of the plaintiff's injuries, in reaching an agreement on the amount for settlement including an evaluation of the probability of success at trial, the costs of trial, such as attorney fees, and the value (objective and subjective) of payment without the delay of further litigation. In fact, the evaluation of the good faith of a partial settlement must allow for the discounting of a claim's full value. *See id.; Donovan v. Robbins*, 752 F.2d 1170, 1181 (7th Cir. 1984).

Because this discounting process takes place in every settlement, the figures reached among the various claimants and Great Lakes lack comparability with the figures reached among those claimants and Chevron. Simply summing the settlement totals does not produce an equivalent

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that fault has been determined properly. In particular, Chevron challenges the notion that the prior finding that it was 70% responsible for the collision, 613 F. Supp. at 1439, applies a fortiori to apportion liability for Self's death, *see* 832 F.2d at 1548 (conceding that Great Lakes may have had greater responsibility in Self's death than in collision alone, but finding issue need not be resolved).

to a judicial finding of damages, contrary to Great Lakes' suggestion, because no basis exists to capture the perceptions of the parties that led them to discount their view of the likely judicial outcome and thereby agree on a settlement figure. This is true even if all of the settlements had been reached contemporaneously; the nine-year time span separating Chevron's settlements and the last of Great Lakes' settlements adds a dimension that also defies measurement. Indeed, eight plaintiffs endured one trial against Great Lakes before reaching settlement and a ninth plaintiff tried her case twice before a peaceful resolution was obtained. Chevron settled all claims against it prior to trial. "As the settling plaintiffs' damages were never established, it is impossible to tell whether or not [the settling defendant from which contribution is sought] paid more than its fair share of the plaintiffs' damages." *Ocean Boat*, 1989 AMC at 597. The Court could do no more than speculate wildly on a figure that would approximate the equivalent value of the settlements in the bodily injury and death cases.[4]

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[4] The matter of fair share, moreover, is an open question. The Eleventh Circuit refused to resolve Self's assertion that the share of Great Lakes' liability for the collision does not approximate its share of liability for the deaths and injuries.

The matters in need of resolution in order to determine contribution are so voluminous that to resolve them, if they are resolvable at all, would involve the staging of the trials that the parties sought to avoid through settlement. Great Lakes labelled "unworthy of consideration" Chevron's argument concerning this burden. The Court views the matter otherwise. Setting aside the destructive impact on future settlements that the precedent of such a trial would have, but *see Robbins*, 752 F.2d at 1170 (asserting that fairness hearings for partial settlements would produce disincentive to settlements), the Court is persuaded that Great Lakes' proposal would invest an enormous amount of judicial resources in an essentially futile enterprise. In addition to the criticisms leveled previously herein, the Court observes that the persons with the greatest knowledge of the relevant issues are the claimants who have settled their claims, and those persons no longer

The foregoing analysis illustrates why it is meaningless to speak of contribution in the absence of a judgment for damages. One state appellate court faced with this controversy held, "where percentages of negligence are appropriately determined by the fact-finder under [the comparative fault statute] and all defendants then settle with plaintiff, any cross-claims against each other are extinguished." *Tefft*, 471 A.2d at 795. Maritime cases in particular do not fit well with a rule of contribution between settling tortfeasors because the key predicate to liability for contribution, potential liability by all joint tortfeasors in an action by the plaintiffs, is abrogated as to all parties by the dismissal of the settled claims prior to final judgment. *Cf. Ocean Boat*, 1989 AMC at 596-97; *see also Empresa Lineas Maritimas Argentinas S.A. v. United States*, 730 F.2d 153, 158 (4th Cir. 1984) (right to contribution does not accrue until after judgment enters).

In accordance with the Court's reasoning as stated in this order, it is

ORDERED AND ADJUDGED:

1. That Great Lakes' Motion for Partial Summary Judgment is hereby denied;

2. That Chevron's Motion for Summary Judgment is hereby granted; and

3. That the Clerk of the Court is hereby directed to enter judgments dismissing the above-styled cases with prejudice.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 16th day of April 1990.

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are parties to these actions. Their absence from the proposed proceedings would reduce the reliability and accuracy of the determinations reached; their presence would be an unjustified burden.

UNITED STATES DISTRICT JUDGE
(//s// Howell W. Melton)

Copies to:

Counsel of Record

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

No. 85-3673

Vivian Marie SELF, as administratrix of the estate of Danny Joe Self, deceased, etc.,
Plaintiff-Appellee, Cross-Appellant,
v.

GREAT LAKES DREDGE & DOCK COMPANY, a corporation
Defendant,
Third Party Plaintiff-Appellant,
Cross-Appellee,
and

Chevron Shipping Company,
Third Party Defendant,
Cross-Appellant.

GREAT LAKES DREDGE & DOCK COMPANY, a corporation,
Plaintiff-Appellant, Cross-Appellee,
v.

CHEVRON SHIPPING COMPANY,
Defendant-Appellee,
Cross-Appellant,
and

Italia Societer Per Az Di Nav;
Defendant.

Complaint of CHEVRON TRANSPORT CORPORATION, as owner of the S/S ROBERT WATT MILLER, in an action for exoneration from or limitation of liability,
Plaintiff-Appellee, Cross-Appellant,

Great Lakes Dredge & Dock Company, a corporation,
Claimant-Appellant,
–
Cross-Appellee.

Dec. 1, 1987.

Rehearing and Rehearing En Banc Denied Jan. 6, 1988.

Ship collided with dredge barge flotilla, injuring and killing crew members of flotilla. Injured crew and survivors of dead crewmen instituted separate actions against employer and dredge operator. Operator filed third-party complaints in each action against operator of ship. Owner of ship filed complaint seeking limitation of liability. The United States District Court for the District of Florida, Howell W. Melton, J., entered judgment on jury verdict finding dredge operator guilty of negligence but also finding that such negligence in no way caused injury to crew. Plaintiffs appealed. The Court of Appeals, 688 F.2d 716, reversed and remanded. After denial of rehearing, 693 F.2d 135, and denial of certiorari, 460 U.S. 1083, 103 S.Ct. 1774, 76 L.Ed.2d 346, the District Court, No. 77-635-CIV-J-M, Daniel Holcombe Thomas, J., 613 F. Supp. 1428, found negligence and awarded damages, but limited damages because of settlement by plaintiff with one of parties. Appeal was taken. The Court of Appeals, Clark, Circuit Judge, held that: (1) survivors of fatally injured seaman could recover from dredge and barge owner full damages, less amount already recovered from shipowner through settlement; (2) evidence did not support trial court's assumption that deceased seaman would never have earned more than minimum wage during periods he was not working on dredge; and (3) shipowner was not entitled to limitation of damages.

Affirmed in part, reversed in part and remanded.

Dewey R. Villareall, Jr., Carl R. Nelson, Tampa, Fla., Courtney W. Stanton, Jacksonville, Fla., John M. Kops, Warren M. Faris, New Orleans, La., for Great Lakes Dredge & Dock Co.

G. Morton Good, Miami, Fla., Richard G. Rumrell, Jacksonville, Fla., for Chevron Shipping Co. & Chevron Transport Corp.

Leonard C. Jaques, Detroit, Mich., for Self.

Appeals from the United States District Court for the Middle District of Florida.

Before CLARK, EDMONSON and KEITH,* Circuit Judges.

CLARK,Circuit Judge:

On February 5, 1975, the ship Robert Watt Miller struck the dredge Alaska and a barge in the St. Johns River near Jacksonville, Florida. A number of seamen were killed or injured in the accident, and this litigation ensued. After over twelve years of proceedings, this case is now before this court for a second time. In the earlier appeal, *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982), *cert. denied,* 460 U.S. 1083, 103 S.Ct. 1774, 76 L.Ed.2d 346 (1983), this court reversed the judgment of the district court because of errors that led to findings of negligence but no award of damages. On remand, the district court conducted a nonjury trial, found negligence, awarded damages, but limited damages because of a settlement by the plaintiff with one of the parties. *See In re Chevron Transport Corp.*, 613 F. Supp. 1428 (M.D. Fla. 1985). All parties appealed to this court raising at least twelve issues altogether. For the reasons discussed below,

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* Honorable Damon J. Keith, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

we affirm in part and reverse in part the judgment of the district court.

I. FACTS

The background and facts of this case are extensively detailed by the district court, *see* 613 F. Supp. at 1431-33, and in this court's earlier opinion, *see* 688 F.2d at 717, and will only be summarized here.

A. *The Parties*

Great Lakes Dredge and Dock Company ("Great Lakes") was the owner and operator of the dredge Alaska and the barge involved in the accident. The Chevron Transport Corporation owned the ship Robert Watt Miller, which collided with the barge and dredge. The vessel was operated by Chevron Shipping Company (collectively "Chevron" unless otherwise noted).

Vivian Marie Self is the widow of Danny Joe Self, a seaman and member of the crew of the barge (collectively "Self" unless otherwise noted). While engaged in the performance of his duties for his employer, Great Lakes, Danny Self lost his life in the accident. Vivian Self was one of the original plaintiffs in this action, which included claims of injured seamen and the representative of the one other seamen who lost his life in the accident. All plaintiffs other than Self have settled their claims. The case is an action at law under § 20 of the Jones Act, 46 U.S.C. § 688 and under general maritime law. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

B. *The Accident*

To briefly summarize, at a little before noon on February 5, 1975, the Robert Watt Miller was proceeding at full speed up the St. Johns River approaching the Port of

Jacksonville. The pilot of the vessel, knowing the Alaska was in the area, radioed to inform the dredge that the ship would soon be passing. The Robert Watt Miller came around a turn in the channel and saw for the first time the placement of the dredge and barge. Based only on visual estimates, the pilot guided the Robert Watt Miller to the north side of the channel. The leverman of the dredge Alaska, when he saw the Robert Watt Miller, stopped dredging and swung the bow of the dredge toward the south bank of the channel.

As the Robert Watt Miller continued up the channel, the pilot and master of the ship noticed a significant sheer of the vessel to port, toward the south side of the channel. According to the district court,

> an order of 10 degrees right rudder was given. The sheer continued and an order of 20 degrees right rudder was given. The master then initiated an order of hard starboard rudder and full ahead on the engines. That order was given at 12:09 but the sheer continued so a full astern was ordered at 12:11.
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> Immediately before impact the pilot of the Robert Watt Miller radioed a warning to the Alaska informing the leverman to clear the dredge and barge of all personnel. He also blew the warning whistle. At about the same time the operator of the dredge's tender tug Tarheel State, lying on the port side of the Alaska, saw the danger, sounded the tug's whistle and moved out of the path of the Robert Watt Miller.
>
> Between 12:10 and 12:12, the time having not been exactly established, the bow of the Robert Watt Miller struck the Alaska. The bow first contacted the dredge's port anchor boom, then struck the hull about 100 feet aft of the bow. The impact broke the coupling between the Alaska and the

[barge]. The Robert Watt Miller slipped down the side of the Alaska, came into contact with the Barge thus causing her to be loosened from the connections to the dredge. The momentum of the Robert Watt Miller continued forward along the [barge] and rolled the barge over on her starboard side. The Robert Watt Miller's engines were stopped at 12:13.

When the Barge rolled over several crewmen were injured; two, including the plaintiff's decedent, lost their lives. The plaintiff's decedent, Danny Self, was a deckhand aboard the Alaska. Around noon on February 5, 1975, he and other crew members gathered in the mess hall for lunch. One minute prior to collision one of Self's fellow crewmen went to the door of the mess hall, saw the Robert Watt Miller and yelled out to the others. At this time the men ran from the mess hall aft to the port side to a ladder near the stern. They continued down the ladder to the main deck and across the gangway to the barge. The men had just reached the barge when the impact of the Robert Watt Miller rolled it over. Eleven crew members were cast into the water.

Immediately, rescue attempts were made by the dredge's tender tugs, the survey board Canaveral and a small fishing boat. In addition, crew members of the Alaska and the Robert Watt Miller threw life rings and flotation equipment attempting to save the men in the water.

Burke, a crew member of the Alaska, had grabbed his life jacket from the handrail when leaving the mess hall. He attempted to save Self by holding on to him, but the suction and current

> prove stronger than the grips of Self and Burke. Self was pulled away and lost his life.

In re Chevron Transport Corp., 613 F. Supp. at 1433.

C. *The Litigation*

> Each of the death and personal injury claimants instituted separate actions against their employer, Great Lakes Dredge & Dock Co. Great Lakes in turn filed third-party complaints in each action against Chevron Shipping Co., as operator of the Robert Watt Miller. Great Lakes also filed suit against Chevron Shipping Co. and Italia Societe Per Az Di Nav. As owner of the Robert Watt Miller, Chevron Transport Corporation filed a complaint seeking exoneration from or limitation of liability.

613 F. Supp. at 1431. Both Chevron companies settled with all of the personal injury and death claimants, including Self. Chevron paid Self the sum of $315,000. The original trial judge severed the third-party complaints and conducted a jury trial between the personal injury plaintiffs and Great Lakes. The jury found that Great Lakes was negligent but found that Great Lakes was not liable to the plaintiffs. For reasons explained in *Ebanks*, this court reversed. On remand, a different district judge consolidated the pending actions for a nonjury trial. All of the personal injury claimants except for Self settled with Great Lakes. At trial, Self's claims against Great Lakes were tried as well as liability issues between Great Lakes and Chevron. The issues of Chevron's and Great Lakes' damages were reserved for later trial.

At trial, all three major parties (Self, Great Lakes, and Chevron) made allegations about causes of the accident and the injuries to seamen. Self alleged that Great Lakes failed to comply with various safety regulations requiring lookouts, life preservers, safety skiffs, and emergency

drills. Self and Chevron alleged that Great Lakes improperly positioned the barge and dredge in the channel. Great Lakes alleged that Chevron negligently allowed its vessel to travel through the channel with insufficient information about the location of the dredge. Evidence on these and other claims were presented at trial.

The trial judge ruled that Chevron was negligent and liable because of the sheer of the vessel and that Great Lakes was liable because of the placement of the dredge and barge in the channel. The court found that Self's total damages amounted to $661,354.00 and that Chevron bore 70% of the fault for the accident while Great Lakes bore 30%. Because Self had already settled with Chevron, and because the trial court was of the view that this court's opinion in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979),[1] required an apportionment of damages, the court awarded Self a judgment of $198,406.20 against Great Lakes, which represents 30% of Self's total damages. The details of the rulings challenged on appeal are discussed more fully below.

D. *This Appeal*

On appeal all three parties are proceeding as appellants or cross-appellants challenging rulings made by the district court below. In the six briefs filed on appeal, at least twelve issues are raised, and in this opinion we must reach all but two of the points raised. For the most part, we will address the issues in the order in which they were presented to this court.

II. SELF'S CLAIMS AGAINST GREAT LAKES

The trial court found that Great Lakes negligently breached its duty to Danny Self by failing to follow Corps

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[1] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1209.

of Engineers safety regulations as required by Great Lakes' dredging contract with the government. 613 F. Supp. at 1437. The court also found that Great Lakes' negligence was a proximate cause of the drowning of Self. *Id.* at 1438. Although in its initial brief Great Lakes did not directly challenge these findings on appeal, we note as a preliminary matter that they are fully supported by the record and the applicable law. We must thus address Self's claims on appeal—challenges to the amount and apportionment of damages.

A. *Apportionment of Damages*

In this appeal Self challenges the application by the district court of apportionment principles set out by this court in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), to the award of damages to Self. Because the court determined that Great Lakes was 30% responsible for the accident, and because Self had settled with Chevron (which was found by the district court to be 70% responsible), the court awarded Self only 30% of the total damages of $661,354. Chevron had paid Self $315,000 and taken a release. The district court was of the opinion that *Leger* required this result, which meant that Self received compensation in the sum of $513,406.20, or $147,948.80 less than the total damages of $661,354.

To understand *Leger*, it is necessary to briefly review the law controlling the apportionment of damages in maritime cases. As early as 1855, it was the law in American courts that damages arising from a maritime collision should be equally divided among joint tortfeasors, regardless of their degree of responsibility for the collision. *See The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170, 15 L.Ed. 233 (1855). The Supreme Court in *The Schooner Catharine* drew on earlier English law that required equal division of damages. Then, in 1975, finding the United States to be "virtually alone among the world's major maritime nations" in adhering to the equal division

of damages rule, the Supreme Court overturned *The Schooner Catharine* and adopted a rule of proportional fault for liability for property damage arising from maritime collisions. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 403, 95 S.Ct. 1708, 1712, 44 L.Ed.2d 251 (1975).[2] *Reliable Transfer* did not address liability for personal injuries caused by a maritime collision.

The Fifth Circuit in *Leger* extended the proportional fault rule of *Reliable Transfer* to reach personal injuries. 592 F.2d at 1249.[3] The *Leger* court then endorsed a rule set out by the district court requiring that "the judgment awarded to the claimant against a nonsettling defendant is credited with the dollar amount represented by the proportion of negligence, if any, attributed to the settling parties." *Id.* at 1248. The court in *Leger* explicitly took the approach that the plaintiff who settles with one joint tortfeasor takes the benefit, or burden, of his bargain. If he makes a "good" settlement, he could receive total compensation more than his actual damages, while if he makes a "bad" settlement he would receive less than his actual damages. *Id.* at 1250 & n.9.[4]

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[2] The primary holding in *Reliable Transfer* is narrow and relatively simple: "We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among parties proportionately to the comparative degree of their fault . . . ." 421 U.S. at 411, 95 S.Ct. at 1715-16.

[3] We have no doubts about the correctness of this aspect of the *Leger* holding.

[4] In *Leger*, the plaintiff made a "good" settlement and ultimately received $310,171.05 in compensation for his injuries, even though the injuries amounted to only $284,090.00. Similarly, in the primary Eleventh Circuit case to follow *Leger*, the plaintiff received $121,000 in compensation although his damages were only $60,000. *See Gormly v. Van Ingen*, 736 F.2d 624, 625 (11th Cir. 1983). The *Leger* court overlooked in its calculations that Travelers Insurance Company received $82,331 of the $127,840 received by Leger from Dresser, leaving Leger with $246,321 ($63,920 balance plus $182,331 initially paid by Travelers). Thus, Leger received less than the total damages awarded.

Two months after this court issued its opinion in *Leger*, the Supreme Court decided *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979). The *Edmonds* opinion included language that cast serious doubt over the full implications of the *Leger* approach. In the wake of *Edmonds*, the Eleventh Circuit backed away from and disavowed certain aspects of *Leger*. *See Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982); *Drake Towing Company v. Meisner Marine Construction Company*, 765 F.2d 1060 (11th Cir. 1985).

Although not directly related to the holding in the case, the Court's opinion in *Edmonds* strongly and repeatedly reaffirmed the right of a plaintiff to recover from any single tortfeasor the full compensation for damages incurred. " 'Nothing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or anyone of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss.' " 443 U.S. at 260 n. 9, 99 S.Ct. at 527 n.9 (quoting *The Atlas*, 93 U.S. 302, 23 L.Ed. 863 (1876)). The Court noted that a "concurrent tortfeasor generally may seek contribution from another, but he is not relieved from liability for the entire damages even when the nondefendant tortfeasor is immune from liability." 443 U.S. at 260 n.8, 99 S.Ct. at 527 n.8.

[1] The Supreme Court in *Edmonds* specifically considered the implications of its opinion in *United States v. Reliable Transfer*, on which the *Leger* decision is based: "[In *Reliable Transfer*] we did not upset the rule that the plaintiff may recover from *one* of the colliding vessels the damage concurrently caused by the negligence of both." *Id.* at 271 n.30, 99 S.Ct. at 534 n.30 (emphasis in original). The Court noted that "[c]ontribution remedies the unjust enrichment of the concurrent tortfeasor, and while it may sometimes limit the ultimate loss of the tortfeasor chosen

by the plaintiff, it does not justify allocating more of the loss to the innocent employee, who was not unjustly enriched." *Id.* In our opinion, this statement rejects the philosophy in the *Leger* case that it is the plaintiff who bears the loss or obtains the gain under facts such as are in this case. The philosophy governing *Edmonds* is clear: any inequity which results from the implementation of a seaman's damage award should be borne by the tortfeasors rather than the seaman himself. *Joia v. Jo-Jo Service Corp.*, 817 F.2d 908, 917 (1st Cir. 1987).

In *Ebanks*, this court's earlier opinion in this case, the panel considered the language quoted above and concluded that "[*Leger's*] effect as precedent has been weakened by *Edmonds*." 688 F.2d at 720. Then, in *Drake Towing*, the court ordered that one joint tortfeasor pay full damages (less that attributable to the plaintiff's own negligence), even though the plaintiff had already settled with another joint tortfeasor. *See* 765 F.2d at 1067. The court considered the *Leger* opinion, and described the *Leger* holding in extremely narrow terms, thereby construing *Leger* to avoid a conflict with the approach endorsed by the Supreme Court in *Edmonds*. At least one other circuit court has determined that the *Leger* approach cannot withstand the more recent *Edmonds* opinion; that court specifically approved of this court's *Ebanks* decision, while specifically rejecting *Leger*. *See Joia*, 817 F.2d at 915-17.

We conclude that the district court erred in relying upon the *Leger* opinion in requiring Great Lakes to pay Self only $198,406.20 instead of $356,350. As we previously mentioned, although this court in *Ebanks* reversed the district court in this case because of a misapplication of the *Leger* principles, it is not altogether surprising that on remand the district court (through a different district judge) again misapplied *Leger*. The *Ebanks* case, in not following *Leger*, relied in part on the fact that in *Leger* all tortfeasors were before the court and jury for the sole purpose of allocating to each tortfeasor its percentage of

liability for paying *Leger's* damages in the amount of $284,090, awarded to *Leger* in a prior jury trial.

> The trial court granted Dresser's motion for a new trial on the ground that the jury should have been informed that DWC and Continental were originally defendants, that Leger had settled his claims against them, and that Travelers was to receive one-half of all sums received by Leger from Dresser. The court considered it necessary that the jury be aware of the continuing interest in the lawsuit of the various witnesses from DWC and Continental.

Leger, 592 F.2d at 1247.

Leger thus differs from this case because Chevron was not before the court in the trial of this case at the first trial but was a party in this second trial for the purpose of assessing liability between Chevron and Great Lakes as to their purported claims against each other. However, at no time after the settlement did Self seek any further damages from Chevron. Under the principle announced in *Luke v. Signal Oil & Gas Co.*, 523 F.2d 1190 (5th Cir. 1975), contributions cannot be obtained by one tortfeasor from a tortfeasor who has settled with and been released by the claimant. The purpose of the second trial in this case was not the same as the second trial in the *Leger* case, which had as its sole purpose the apportionment of damages between the tortfeasors.

There are other facts that distinguish this case from those very peculiar facts in *Leger*. As mentioned previously, Travelers' policyholders, DWC and Continental, had a monetary interest in the amount of damages collected by Leger from non-settling codefendant Dresser. Their interest in Leger's damages was that Travelers was to receive one-half of any funds collected by Leger from Dresser. There is no similar agreement in this case. Another distinctive fact was that in the second trial on the

sole issue of the apportionment of liability amongst the three tortfeasors, DWC, Leger's employer was found to be guilty of no negligence, thus skewing the award of damages in the amount of $82,331.05 paid by Travelers in DWC's behalf to Leger in settlement. Thus, this sum was not used in reducing the judgment and was a windfall to Leger, which offset in part the sum that Leger had to pay to Travelers. The last distinctive difference between the *Leger* case and this one is that Leger was found to be 35% contributorily negligent, which affected the complicated calculations.

Because of these distinctions, namely the change in the law by *Edmonds* and *Ebanks*, and the differences in the facts, we do not consider *Leger* as controlling our opinion in this case.

We do not overlook the fact that in a case such as this, a joint tortfeasor may be left paying a higher or lower percentage of the damages than it caused. Nor do we overlook the rule that there may be joint contribution amongst tortfeasors in an admiralty case and that in the absence of a settlement, the amount of contribution turns on the percentage of fault of each joint tortfeasor. *See Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974). *Leger* upheld that "settling defendants are relieved of any further liability to the plaintiff." 592 F.2d at 1248 (relying upon *Luke v. Signal Oil & Gas Co., supra.*). It is obvious that the rule announced in *Luke* overrides the right of contribution.

We acknowledge that the rule that we adopt today may cause disparity in the percentage of payment as between the settling and nonsettling tortfeasors in maritime personal injury actions. We note, however, that this court is not unique in adopting such a rule. Among those states that have incorporated comparative fault principles into their tort systems, but have retained the rule that there is no contribution from settling tortfeasors, there is a split

of authority as to how a nonsettling tortfeasor's share of damages should be calculated. Some states have adopted the rule that *Leger* employed, while others require that the nonsettling tortfeasor's share be reduced only by the amount paid by a settling tortfeasor. Prosser and Keeton, *The Law of Torts*, § 67 at 476 (5th ed. 1984).

[2] As we are bound by the Supreme Court's guidance and the rule in *Edmonds*, we adopt the latter of these approaches.[5] We hold that Self can recover from Great Lakes the full damages, less the amount already recovered from Chevron through the settlement. The *Leger* approach has much merit in terms of efficiency and realistic settlement practices, but *Edmonds* and Eleventh Circuit cases following *Edmonds* require this result.[6]

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[5] In doing so, we note that the facts in this case make our decision compelling. Self was innocently eating his lunch on the barge some thirteen years ago as the Robert Watt Miller was bearing down upon the barge. His widow settled her claim and her children's claims with Chevron, owner of the Robert Watt Miller. The claim against Great Lakes is still unpaid and the subject of this appeal. Both tortfeasors were obviously negligent. Self's widow should not be penalized for settling with Chevron; nor should one in her position be forced to await the outcome of a lawsuit between two litigious defendants in order to ensure receipt of damages properly assessed against them.

[6] Effectively, our holding today reaffirms the rule set out in *Billiot v. Sewart Seacraft*, 382 F.2d 662, 664-65 (5th Cir. 1967), which the *Leger* court rejected based on *Reliable Transfer*. Because the Supreme Court's more recent opinion in *Edmonds* reveals that *Leger* misconstrued *Reliable Transfer*, we return to the rule in effect before *Leger* modified it. Because *Leger* was a panel decision, and the en banc court has not overruled *Billiot*, we consider *Billiot* still to be valid law. *Billiot* held that a claimant may settle with one tortfeasor, proceed against another for the total amount of the damages, and the court will deduct the amount paid by the settling tortfeasor from the recovery against the second tortfeasor. This results in the claimant receiving the exact amount of his damages. The risk or wisdom of settling in contrast to going to trial falls upon whichever tortfeasor had the best foresight.

We note that, unlike the Eleventh Circuit, the Fifth Circuit has fully endorsed the *Leger* approach, and has plainly stated the effect it can

Finally, we note that the remedial nature of general maritime law, and the Jones Act in particular, support this result. "The joint and several loss allocating mechanism which serves to provide an injured seaman his full judgment is consonant with the policy behind the Jones Act, to provide protection to seamen who are victims of negligence." *Joia,* 817 F.2d at 917 (citations omitted). In cases such as this, the general goal of maritime law is to provide quick and full compensation to the injured seaman, while leaving the primary litigation dispute to the question of which joint tortfeasor is liable for what percentage of the damages. Historically maritime law has treated seamen as in need of special protection; until the Supreme Court suggests otherwise, we cannot move away from that special protection to an arguably more "efficient" system in which an injured seaman is viewed as an equal party with equal bargaining power. Because of our resolution of this claim, we need not reach Self's contention that the trial court erred by apportioning liability based on degrees of fault for the collision, instead of apportioning liability based on degrees of fault for the death of Danny Self. Arguably, because Chevron had nothing to do with the safety violations of Great Lakes, Great Lakes bears a greater degree of responsibility for Self's death than it does for the collision itself. We do not address this argument.

B. *Specific Findings of Damages*

[3] On appeal, Self argues that the district court failed to make adequate findings of fact as required by Fed.R.Civ.P. 52 concerning various claims for damages. With regard to certain issues discussed below, we agree. Rule 52 requires that the trial court "find the facts spe-

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have on a seaman's recovery. *See, e.g., In re Incident Aboard D/B Ocean King,* 813 F.2d 679, 689 (5th Cir. 1987); *Diggs v. Hood,* 772 F.2d 190, 196 (5th Cir. 1985). Because we think this approach is inconsistent with Supreme Court doctrine, we cannot agree with the Fifth Circuit.

cially and state separately its conclusions of law thereon." "[T]he findings must be specifically detailed to give [an appellate court] a clear understanding of the analytical process by which ultimate findings were reached and to assure us that the trial court took care in ascertaining the facts." *Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 433 (5th Cir. 1977). "This court cannot be left to guess. The findings and conclusions we review must be expressed with sufficient particularity to allow us to determine rather than speculate that the law has been correctly applied." *Hydrospace-Challenger, Inc. v. Tracor/MAS, Inc.*, 520 F.2d 1030, 1304 (5th Cir. 1975).

Although the district court's opinion is generally careful and thorough, it does fail to make sufficient findings to permit adequate review of Self's claims for damages. A remand for appropriate findings is the normal procedure. *See Armstrong v. Collier*, 536 F.2d 72, 77 (5th Cir. 1976). A "remand is not required if a complete understanding of the issues is possible in the absence of separate findings and if there is a sufficient basis for the appellate court's consideration of the merits of the case. Where the acts relied upon to support the judgment are in the record and are undisputed remand is unnecessary." *Gulf Towing Co. v. Steam Tanker, AMOCO New York*, 648 F.2d 242, 245 (5th Cir. Unit B June 1981). As discussed below, however, Great Lakes and Self disagree about the appropriateness of certain claims for damages. In this case, we think it more appropriate for the district court to make the initial findings on these claims, because that court has had the benefit of receiving first hand all of the evidence of the events leading to Danny Self's death.

1. *Conscious Pain and Suffering*

The trial court made no findings or award of damages for conscious pain and suffering experienced by Danny Self before he died. Although the lower court's opinion makes no reference to pain and suffering, the record paints a

vivid picture of the final moments of Self's life. According to Burke, the seaman who tried to save Self, men thrown into the water when the barge overturned were sucked under the water for what "seemed like an eternity." Record, Volume 24, at 61. After Burke surfaced, Self then surfaced, and Burke saw that Self had no life jacket. Burke told Self to hold on to him, which Self did. *Id.* at 62. According to Burke,

> we struggled more or less. For the most part, his feet were on my shoulders and I was kicking, trying to surface. He was on top of me. That's where we stayed. Then we hit the ship and that's when he lost it, or I lost him, however it worked out. We lost our grip on one another. I saw him leaving me. I tried to reach him, but the buoyancy of my jacket kept me up so I couldn't. And I just saw him slip under me. . . . I know the water was moving very swiftly. . . . It was cold. I don't know what the exact temperature was, but it was pretty icy to go overboard, I know that.

Id. at 62-64. It seems clear that Self was conscious for at least a few moments after the barge overturned and before Self and Burke lost their grip and sucked Self under the water to his death.

[4, 5] A damages award for conscious pain and suffering is appropriate, depending on the facts, in maritime wrongful death actions. *See Hlodan v. Ohio Barge Line,* 611 F.2d 71, 76 (5th Cir. 1980); *Dickerson v. Continental Oil Company,* 449 F.2d 1209, 1216 (5th Cir. 1971). In *Hlodan,* the "evidence showed that for some undetermined number of minutes before his death Hlodan was aware of his predicament, and that his death by drowning was not instantaneous." 611 F.2d at 76. In *Dickerson,* the court wrote that if "the decedent was conscious while in the water, . . . then it must be without dispute that he did suffer

some pain . . . from the anguish of struggling against drowning." 449 F.2d at 1216. We think that in this case the district court should have made specific findings about pain and suffering damages to which Self may be entitled. *See Lettsome v. United States,* 411 F.2d 917, 923 (5th Cir. 1969) (remanding for specific Rule 52(a) findings on pain and suffering in maritime injury case).

2. *Unseaworthiness*

[6] Similarly, the district court made no specific mention or findings about the seaworthiness of the dredge Alaska. It may be that the lower court factored a finding of unseaworthiness into the award of damages, or that the court found that the vessel was in fact seaworthy. Without any discussion of seaworthiness and of whether any unseaworthiness should enhance Great Lakes' liability to Self, however, we cannot adequately review the district court judgment. *See Glapion v. MS Journalist,* 487 F.2d 1252 (5th Cir. 1973) (affirming specific findings concerning seaworthiness due to defect in ship, but remanding for specific findings concerning safety violation). In light of the district court's award of nonpecuniary damages to Self, we can almost assume that the court found the vessel to be unseaworthy. *See Ivy v. Security Barge Lines, Inc.,* 606 F.2d 524 (5th Cir. 1979) (en banc) (holding that nonpecuniary damages cannot be awarded under Jones Act). Rather than speculating, however, we prefer to allow the district court to state its findings clearly.

[7] The record suggests that a finding of unseaworthiness would be plausible. Violations of safety regulations can lead to finding of unseaworthiness, *see Manning v. M/V "Sea Road,"* 417 F.2d 603 (5th Cir. 1969), as can the failure to adequately train a ship's crew, *see Hercules Carriers, Inc. v. Claimant State of Florida,* 768 F.2d 1558 (11th Cir. 1985). We leave to the district court on remand the determination in the first instance of questions of seaworthiness and possible enhancement of damages. *See*

Farbwerke Hoeschst A.G. v. M/V "Don Nicky," 589 F.2d 795 (5th Cir. 1979) (remanding for specific findings on unseaworthiness and damages).

3. *Punitive Damages*

[8, 9] As with unseaworthiness, the lower court order is silent about punitive damages. Punitive damages should be available in cases where the shipowner willfully violated the duty to maintain a safe and seaworthy ship, as was found to exist on the part of Great Lakes by the district court, or where the shipowner's acts (or failures to act) recklessly increased the danger of a disaster. In this case, Great Lakes had been warned by local pilots' association about the possibility of the exact type of collision that occurred (involving a ship shearing into the barge), yet Great Lakes chose to ignore the warnings, and may not even have passed the warnings on to the crew of the dredge Alaska. Furthermore, Great Lakes' failure to maintain adequate safety devices and procedures on the Alaska may rise to the level of willfulness or recklessness. In light of these facts, we think that some specific determination about punitive damages must be made. We will leave the initial decision to the district court on remand. *See Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. Unit B July 1981) (remanding for findings on punitive damages).

4. *Prejudgment Interest*

[10] Again, the lower court opinion is silent about prejudgment interest. In general,

> prejudgment interest should be awarded in admiralty cases—not as a penalty, but as compensation for the use of funds to which the claimant was rightfully entitled. Discretion to deny prejudgment interest is created only when there are "peculiar circumstances" that would make it inequitable for the losing party to be forced to pay prejudgment interest.

Noritake Co. v. M/V Hellenic Champion, 627 F.2d 724, 728 (5th Cir. Unit 1980) (footnote and citations omitted). Although it is accepted practice to *award* prejudgment interest without making specific findings, *see id.* at 729, a denial of interest usually calls for specific findings.

> [I]n any admiralty case in which the trial court refuses to award prejudgment interest, the best practice would be for it to detail the peculiar circumstance it has found, and specifically indicate that it is denying prejudgment interest as an exercise of the discretion created by the existence of peculiar circumstances.

Id. at 729 n. 4. In the absence of clear findings by the district court, an appellate court could search the record for "peculiar circumstances" and decide to award or deny prejudgment interest without a remand. *See Noritake*, 627 F.2d at 730 (awarding interest); *Parker Towing Co. v. Yazoo River Towing, Inc.*, 794 F.2d 591, 594 (11th Cir. 1986) (denying interest). In this case, however, because we are remanding to the district court for reconsideration of other possible awards of damages, we choose also to remand this question for explicit findings by the court below.[7]

C. *Minimum Wage for Life*

[11] Before his death, Danny Self did not typically work on a dredge year round (presumably because of the sea-

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[7] A remand in this case is especially appropriate because there is a possibility that some form of interest was already calculated into the district court's award to Self. Apparently, the district court adopted without modification the pecuniary loss calculations proposed by Great Lakes' expert, *see* Record, Vol. 29 at 12-62, and there is a suggestion that these figures include some type of interest, *see id.* at 26. If, in fact, prejudgment interest was included in the award made by the court below, appellate review would have been simplified if that fact was made clear in the district court's decision, along with an explanation of how the interest was calculated.

sonal nature of the work). In addition to the dredge work, the district court "assume[d] Mr. Self would also work 790 hours per year . . . at a job earning minimum wage." 613 F. Supp. at 1438. On appeal, Self contends that the district court erred by making this assumption, arguing that the "assumption" was not a finding of fact, and that if it was, it is clearly erroneous.

In reviewing the district court's opinion, it is not clear whether this assumption was a finding, and thus it is unclear whether the assumption deserves the deference normally accorded to findings of fact. For purposes of this decision, we will assume that the assumption *is* a finding of fact. Having searched the record on appeal, however, we can find no evidence to support the assumption, and we thus determine that, based on the current record, it is clearly erroneous. The trial judge apparently drew the assumption from an assumption made by Great Lakes' expert. *See supra* note 12. Yet, as the expert admitted, his assumption did not take into account any experience or skills that Self would acquire in his dredging work, notwithstanding the fact that the district court found that Self would advance to the position of mate and then leverman on the dredge. By adopting the expert's assumption, the district court essentially held that a leverman (who is second only to the captain of a dredge) would hold only semi-skilled jobs during the off-months, for the remainder of his career. The assumption also ignores the uncontradicted evidence that prior to his death Self had worked in the construction field during at least one of the non-dredge periods, and that the wages in the construction field were typically higher than minimum wage. Based on the record, we thus hold that the district court's assumption is clearly erroneous.

On remand, the trial court may decide to require more evidence as to Self's non-dredge work. We do not reject the possibility that based on further evidence the trial court will conclude that Self would only earn the minimum

wage for at least a portion of his career. We only hold that based on the record as it now stands, there is no support for the trial court's assumption that Self would never have earned more than the minimum wage during the periods he was not working on a dredge.[8]

D. *Reduction of Future Wages to Present Value*

[12] Self challenges on appeal the method used by the district court to calculate the present value of its award of future earnings. As Great Lakes concedes in their brief on appeal, the district court used the "case-by-case" method that was specifically rejected by the en banc court of the former Fifth Circuit in *Culver v. Slater Boat Co.*, 722 F.2d 114, 120 (5th Cir. 1983) (en banc).[9] *Culver* required that courts in this circuit use the "below-market discount" method to adjust awards of future damages to present value. The district court's mistake is largely due to its reliance on Great Lakes' expert, who used the incorrect method.

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[8] We acknowledge that one likely reason behind the trial judge's adoption of the defendant's expert's assumption is that the plaintiff failed to present completely comprehensive evidence of these damages. While there is sufficient evidence in the record to make us question the trial court's assumption, we must repeat Judge Johnson's admonition that "it would behoove future litigants when preparing for trial to study carefully the horizon of damages before heading off down the trail. . . . The record at trial must be fully developed on the issue of damages. . . . Relying on an appellate court to sort through the record and calculate the appropriate damages merely delays achieving a just and reasonably accurate final judgment." *Dealke v. John E. Graham & Sons*, 756 F.2d 821, 834 (11th Cir. 1985). If the trial court on remand concludes that plaintiff was negligent in presentation of evidence on this issue, he may reach the same conclusion as he initially reached. We remand because it is not clear to us why the minimum wage figure was used.

[9] Culver is binding precedent on this court. *See Stein v. Reynolds Securities, Inc.*, 756 F.2d 821 (11th Cir. 1985).

In this appeal, Great Lakes argues that the error was harmless. Its expert used a 10.75% discount rate, which is substantially higher than the 1% - 3% rate approved in *Culver*. Because their expert allowed for inflation in the initial calculations (contrary to the approach used in *Culver*), Great Lakes argues that the effective discount rate is only marginally higher than the 3% rate approved in *Culver*. Thus, according to Great Lakes, the use of the improper method was harmless.

For two reasons, we decline to reach the question of whether the use of the discredited case-by-case method can ever be harmless. First, the Great Lakes expert applied the too-high discount rate to *all* future damages, including those not adjusted upward for inflation. Thus, at least for certain portions of the damages award, the effective discount rate was substantially higher than is proper. Second, in light of our remand above for a reassessment of the use of the minimum wage for Danny Self's entire life, it is likely that the entire damages figure will need to be recalculated. On remand, the district court should use the "below-market discount" method described in *Culver* and *Deakle v. John E. Graham & Sons*, 756 F.2d 832 (11th Cir. 1985).

E. *Damage for Loss of Society*

[13] The district court awarded to Mrs. Self $70,000 for the loss of society, love, and companionship of her deceased husband, and the court awarded $15,000 to each of Danny Self's two children. On appeal, Mrs. Self argues that these awards are grossly inadequate. Self cites numerous cases where $200,000 to $500,000 was awarded for loss of society. Great Lakes, on the other hand, cites cases where $25,000 to $75,000 was awarded for loss of society.

In reviewing the amount of damage awards, this court is generally limited to the question of whether the trier

of fact abused its discretion. *See Hawkes v. Ayers*, 537 F.2d 836, 837 (5th Cir. 1976). While the district court did not describe how it determined the amount of the awards for loss of society, we do not find any abuse of discretion in the amount. "Although the award was small, it was not 'unconscionably inadequate,' therefore, we may not disturb the award on appeal." *Kramer v. Keys*, 643 F.2d 382, 386 (5th Cir. United A Apr. 1981) (citation omitted). We thus affirm the district court's award of damages for loss of society.[10]

III. GREAT LAKES' CLAIMS AGAINST CHEVRON

The remainder of this opinion deals with issues arising out of Chevron's and Great Lakes' attempts to shift responsibility for the collision to determine apportionment of damages to their respective vessels. As discussed above, the district court found that Great Lakes was negligent toward Danny Self by failing to maintain and conduct certain required safety features and procedures. The lower court also found that Great Lakes violated the Pilot Rules for Inland Waters, 33 C.F.R. § 80.26(c) (1974) (in effect at the time of the collision), and that the violation was a contributing cause of the collision. On appeal, Great Lakes challenges this finding, as well as two other rulings made by the district court.

A. *Violation of 33 C.F.R. § 80.26(c)*

[14] The Pilot Rules for Inland Waters, in force in February of 1975, required that

> [w]hen any pipe line or swinging dredge shall have given an approaching vessel or tow the sig-

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[10] On remand, the trial court can, at its discretion, consider additional evidence on this point, and increase the award for loss of society if appropriate. We do not hold that the amount of the award is at all *required* to be at the level set by the district court, only that the level set is within the range of permissible awards.

> nal that the channel is clear, the dredge shall straighten out within the cut for the passage of the vessel or tow.

33 C.F.R. § 80.26(c) (1974) (no longer in effect). The district court held that Great Lakes violated that regulation because, instead of "straightening out" and bringing the line of the dredge so that it was parallel to the channel, the leverman of the dredge brought the bow closer to the bank of the river (and thus farther from the center of the channel). Great Lakes argues that the trial judge misinterpreted the regulation and that even if there was a violation of the regulation the district court incorrectly applied the rule in *The Pennsylvania,* 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1874), to shift the burden to Great Lakes to disprove that the violation was related to the accident.

1. *The Violation*

Both Chevron and Great Lakes (and Self in support of Chevron on this issue) argue that the plain language of the rule supports their positions. Chevron argues that the words "straighten out in the cut," or the channel, means just that—straighten out instead of lie at an angle. Great Lakes on the other hand argues that if the rule intended to require that a dredge be parallel to the channel, it would have so stated. After hearing testimony on the meaning of § 80.26(c), the trial judge determined that "straighten out in the cut" meant "straighten out to be parallel to the line of the cut." The court then found that Great Lakes violated that rule. While a "finding of statutory fault is primarily a factual issue governed by the clearly erroneous standard," *Orange Beach Water, Sewer and First Protection Authority v. M/V Alva,* 680 F.2d 1374, 1380 (11th Cir. 1982), we must review the district court's ruling to ensure that it did not misinterpret the meaning of the rule.

Great Lakes argues that the district court's interpretation that the rule means "parallel to the channel" is in conflict with the Coast Guard's interpretation of the rule; Great Lakes argues that we must defer to the agency's interpretation of its own rule. The "agency interpretation" that Great Lakes advances is the formal report made by the Coast Guard following its investigation into the collision. Great Lakes argues that in the report's conclusions, no mention was made of a violation of § 80.26(c), and this constitutes an interpretation by the Coast Guard that the rule did not mean "parallel to the channel" and thus the rule was not violated.[11] We note that, as Great Lakes concedes, the legal conclusion that Great Lakes did not violate the rule is inadmissible evidence. *See Smith v. Ithaca Corporation*, 612 F.2d 215, 223 (5th Cir. 1980). We decline to take Great Lakes' invitation to construe the absence of any mention of § 80.26(c) as a formal agency interpretation of that rule. This case is quite different from cases in which an agency has formally interpreted a rule, or has promulgated an interpretation in the Code of Federal Regulations. *See, e.g., Allen M. Campbell Company*

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[11] In its brief, Great Lakes quotes from the conclusions of the Coast Guard's report: "The corrective action of moving completely out of the channel at pilot request (as opposed to swinging the bow over) taken by Great Lakes Dredge and Dock Company in response to the pilots [sic] letter and Coast Guard requests was adequate to allow safe navigation in the area." (emphasis added). Great Lakes argues that the quoted language suggests that Great Lakes took the appropriate action. Reading the report in its entirety, however, we reach a different conclusion. The report describes two methods for a dredge to move out of the way of a passing ship: swinging the bow over or moving the entire dredge out of the way. The report details how Great Lakes only moved the bow over. We read the quoted language to approve the other method—moving the entire dredge out of the channel. We do not perceive any conclusions about simply moving the bow over. The primary point of the Coast Guard's conclusion from which Great Lakes quoted is that the local pilots should be informed that they should, in the future, request that the entire dredge be moved, instead of merely having the bow swung over.

General Contractors v. Lloyd Wood Construction Co., 446 F.2d 261 (5th Cir. 1971). In this case, we have only the Coast Guard's silence, which we will not take to be a formal interpretation that "straighten out in the cut" does not mean "parallel to the channel."

In the absence of any formal interpretation by the Coast Guard of the meaning of § 80.26(c), we find that the district court reasonably relied on the testimonial evidence presented by a number of witnesses, including Coast Guard officials and a Great Lakes employee, to the effect that they would interpret the rule to mean "parallel to the channel." Great Lakes cites a number of cases involving facts very similar to those here where the courts did not find any fault in a dredge swinging its bow out of the channel. *See, e.g., The Ditmar Koel*, 65 F.2d 555 (5th Cir. 1933); *The Freeport*, 99 F.2d 842 (4th Cir. 1938). None of the cited cases, however, involved an interpretation of § 80.26, and there was no suggestion in any of the cases that there was a then-existing rule that the dredge arguably violated. Here, we have a rule that requires a dredge to "straighten out in the cut." After considering the rule and the testimony, we affirm the district court's interpretation that the rule means "parallel to the channel," and that Great Lakes violated the rule.[12]

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[12] Arguably, a commonsense approach supports Great Lakes: By swinging the bow toward shore, instead of bringing the dredge to a position parallel to the channel, Great Lakes actually brought the dredge *farther* out of the channel. As was argued below, however, a rule requiring the dredge to be parallel to the channel serves a number of plausible goals, including presenting a lesser target for an approaching vessel and giving an approaching vessel the proper perspective of the center line of the channel. The district court presumably had this second point in mind when it concluded that the "angle at which the Alaska and [the barge] was positioned in the Drummond Creek Cut distorted the perception of the navigators of the Robert Watt Miller as the tanker came around Broward Point Turn." 613 F. Supp. at 1436.

2. *The Pennsylvania Rule*

Having affirmed the district court's determination that Great Lakes violated 33 C.F.R. § 80.26(c) (1974), we must now consider the applicability of the rule set out in *The Pennsylvania,* 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1874), to the facts of this case. In *The Pennsylvania,* the Supreme Court held that when a ship involved in a collision is in violation of a statutory rule designed to prevent collisions, the burden shifts to that ship to disprove that the violation was a contributing cause of the collision. Specifically, the Court wrote:

> The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the cases, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.

Id. at 136, 22 L.Ed.2d at 151. In that case, the Court held that although the steamship Pennsylvania was primarily responsible for its collision with the bark Mary R. Troop, the bark was also liable because of its violation of a rule requiring the use of foghorns when underway in fog.

Since its inception over one hundred years ago, *The Pennsylvania* rule has increasingly come under attack, with courts and commentators terming the rule "harsh," *Board of Commissioners v. M/V Farnsum,* 574 F.2d 289, 297 (5th Cir. 1978), and "drastic," G. Gilmore & C. Black, *The Law of Admiralty* 494 (2d ed. 1975). The harshness of the rule

is clear when viewed in light of the pre-*Reliable Transfer* rule of *The Schooner Catharine,* requiring equal division of damages among joint tortfeasors. *See The Pennsylvania,* 86 U.S. (19 Wall.) at 138, 22 L.Ed. at 152. Prior to *Reliable Transfer,* a ship that violated a rule but could not overcome *The Pennsylvania* burden would be liable for an equal share of the damages caused by a collision, even though the violation only marginally contributed to the collision. Critics have advocated the rule's abolition, *see Tetley, The Pennsylvania Rule—An Anachronism? The Pennsylvania Judgment—An Error?* 13 J. Mar. L. & Com. 127 (1982), and courts, including the former Fifth Circuit, have ensured that *The Pennsylvania* burden is not insurmountable, *see Compania de Maderas de Caibarien v. The Queenston Heights,* 220 F.2d 120, 122-23 (5th Cir. 1955).

Great Lakes goes beyond criticizing *The Pennsylvania* rule, however, and argues that the rule has been overturned by the Supreme Court in *United States v. Reliable Transfer Co. See supra* at 1545. In support of this claim, Great Lakes cites a Ninth Circuit case which includes language suggesting that *The Pennsylvania* decision was overruled by *Reliable Transfer. See People of the State of California v. Italian Motorship Ilice,* 534 F.2d 836, 840 (9th Cir. 1976). Great Lakes, however, misunderstands the effect of *Reliable Transfer* and misreads the Ninth Circuit's *Ilice* decision, which expressly refused to disturb an application of *The Pennsylvania* rule by the district court in that case. *Id.*

What Great Lakes misunderstands, and what the Ninth Circuit noted, is that the adoption of comparative fault by the Supreme Court in *Reliable Transfer* did nothing to overturn *The Pennsylvania* rule, but instead simply eased the rule's harshness.[13] Prior to *Reliable Transfer,* a ship

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[13] Even the critics of *The Pennsylvania* rule acknowledge that *Reliable Transfer* did not overturn it. *See* Tetley, *supra,* 13 J. Mar. L. & Com. at 145.

unable to overcome *The Pennsylvania* rule bore an equal portion of the liability; after *Reliable Transfer*, a ship that violated a statutory rule is only liable in proportion to the comparative degree of fault for the accident.

[16, 17] To make clear what the rule set out in *The Pennsylvania* is still viable, we note that *The Pennsylvania* involved presumptions and burdens of proof, while the *Reliable Transfer* case involved division of liability. The goals underlying *The Pennsylvania* rule—a concern that maritime rules be strictly observed—were not in the least disturbed by the *Reliable Transfer* decision. "The clear general rule is that the navigational rules are 'rigorously enforced' and strictly interpreted." *Garrett v. Higgenbotham*, 800 F.2d 1537, 1540 n. 6 (11th Cir. 1986) (citing *Belden v. Chase*, 150 U.S. 674, 698, 14 S.Ct. 264, 271, 37 L.Ed. 1218 (1893)). "Masters [of ships] are bound to obey the rules, and entitled to rely on the assumption that they will be obeyed . . . " *Belden*, 150 U.S. at 699, 14 S.Ct. at 272. The need to strictly enforce maritime rules is as strong today as it was in 1874, and the *The Pennsylvania* decision announced one hundred years ago still furthers that purpose. We thus find that the district court appropriately applied *The Pennsylvania* rule to this case, and we affirm the district court's finding that Great Lakes did not meet its burden under that rule.[14]

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[14] Great Lakes also argues that the presumptions of *The Pennsylvania* rule should not be applied in the face of the seemingly conflicting presumptions found in *The Oregon*, 158 U.S. 186, 15 S.Ct. 804, 39 L.Ed. 943 (1895), which held that when a moving vessel strikes an anchored one a presumption of negligence on the part of the moving vessel arises. We do not see these presumptions as conflicting—together they only suggest that both Great Lakes and Chevron are presumptively liable (Great Lakes for its rule violation and Chevron because of its status as the moving vessel). In any event, the district court explicitly, and appropriately, weighed the competing presumptions of *The Pennsylvania* and *The Oregon* cases in determining the proportionate fault of the two vessels in question. *See Complaint of Chevron Transport*

B. *Exclusion of Commander Cavallero's Deposition*

Great Lakes challenges the failure of the district court to admit into evidence at least portions of a deposition taken by the parties of Coast Guard Commander Samuel Cavallero. Commander Cavallero was the investigating officer who prepared the formal Coast Guard report on the collision. *See supra* at 1552-1553. The report, although not its conclusions, were admitted; the trial judge refused to admit the deposition.

When Great Lakes attempted to have the deposition read into evidence, Chevron objected and argued that the deposition was "all hearsay." The trial judge decided to review the deposition overnight. *See* Record, Vol. 27 at 148-53. The following morning, after reading most of the deposition, the trial judge ruled that the deposition could not, in its entirety, be admitted; he stated that the "great majority of it is hearsay." He did admit all exhibits that were properly identified in the deposition. *See* Record, Vol. 28 at 32. On appeal, Great Lakes argues that the judge committed error by refusing to admit the deposition.

[18, 19] We have reviewed the challenged deposition in its entirety, and agree with the district court's conclusion that most of the deposition is hearsay. On appeal, Great Lakes points to specific small portions of the deposition that would arguably be admissible. Great Lakes, however, did not bring any of these passages to the attention of the district court, and made no requests to admit specific

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Corporation, 613 F. Supp. at 1436.

In a footnote in its brief, Great Lakes also argues that *The Pennsylvania* rule may conflict with the general burdens of persuasion set out in Fed.R.Evid. 301. We reject the suggestion that the Federal Rules of Evidence altered *The Pennsylvania* rule. We agree with the Fifth Circuit that the adoption of the federal rules did not modify the substantive burdens and presumptions long established in federal admiralty law. *See James v. River Parishes Co.*, 686 F.2d 1129, 1133 (5th Cir. 1982).

portions. When a document a party seeks to admit is full or inadmissible material, it is incumbent on the party to specifically note the admissible exchanges in the document. The district court cannot be expected to wade through a 129-page deposition pulling out the handful of admissible exchanges in the document. We affirm the refusal of the district court to admit the deposition in its entirety, and we hold that Great Lakes cannot attempt on appeal to gain the admission of specific passages when Great Lakes did not present those passages to the district court. If any of the passages were vitally important to Great Lakes' defense, as they claim on appeal, they should have raised them to the district court. A district court will almost always be willing to consider specific sections of a document that is not admissible in its entirety.

C. *Great Lakes' Claim for Indemnity*

Great Lakes challenges the district court's order, entered before the trial, granting Chevron's motion for summary judgment on Great Lakes' claim for indemnity from Chevron. At the time the motion was granted, Great Lakes argued that it might be held liable based only on a technical finding of unseaworthiness, and that in such a case Great Lakes had a right to indemnity from Chevron based on the concepts of active and passive negligence. The district court rejected this argument, and granted Chevron's motion. Great Lakes retained, of course, a right to contribution from Chevron.

[20] In *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493 (5th Cir. 1982), the new Fifth Circuit considered arguments similar to those presented here by Great Lakes. As that court indicated, the active-passive negligence doctrine was a device aimed at easing the burden of the equally-divided damages rule of *The Schooner Catherine*. As discussed above, however, the Supreme Court rejected that rule in favor of comparative fault in *United States v. Reliable Transfer*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251

(1975). The Fifth Circuit noted that "is difficult to see the need for the active-passive indemnification rule in a comparative fault system." *Loose,* 670 F.2d at 501-02. That court abolished the active-passive negligence rule. We agree with this reasoning, and hold that in an admiralty case where the district judge assesses the relative degrees of fault, there is no place for the active-passive negligence doctrine. A tortfeasor only passively negligent will presumably bear a smaller percentage of the fault for an injury. If, because of other rules and obligations, a passively negligent tortfeasor initially pays more than its share, it can seek contribution from the more active tortfeasor. In the case below, the district court granted partial summary judgment on the issue of indemnity, and left the possibility of contribution available. We affirm the district court on this point.

IV. CHEVRON'S CLAIMS AGAINST GREAT LAKES

[21] On appeal, Chevron argues that the district court erred by denying its complaint seeking limitation of liability under the 135-year old Limitation of Liability Act, 46 U.S.C. § 183 (1986). According to that act,

> the liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, mater, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity of knowledge of such owner or owners, a shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Id. § 183(a). As this court has detailed,

> a determination of whether a shipowner is entitled to limit his liability involves a two-step

> analysis. . . . "First, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness." Moreover, once a claimant satisfies the initial burden of proving negligence or unseaworthiness, the burden of proof shifts to the shipowner to prove the lack of privity or knowledge.

Hercules Carriers, Inc. v. Claimant State of Florida, 768 F.2d 1558, 1563-64 (quoting *Farrell Lines, Inc. v. Jones*, 530 F.2d 7 (5th Cir. 1976)) (other citations omitted).

In the limitation of liability context, the district court's findings about negligence, unseaworthiness, privity, and knowledge are considered on appeal to be factual findings subject to review under the clearly erroneous standard. *See Hercules Carriers, Inc.*, 768 F.2d at 1565. Chevron argues in this appeal, however, that the district court erred as a matter of law in finding negligence, privity, and knowledge. Because we read the district court's opinion differently than Chevron, and we think Chevron misunderstands the lower court's refusal to allow Chevron to limit its liability.

According to Chevron's briefs on appeal, the district court ruled that Chevron was negligent because a critical Notice to Mariners discussing the dredging operation was not on board the Robert Watt Miller at the time of the collision. Chevron points to the district court's statement that "there is no evidence that the notice . . . ever reached the Robert Watt Miller," 613 F. Supp. at 1437, and argues that the district court impermissibly shifted the burden of proof on the issue of negligence away from Great Lakes and onto Chevron. Chevron argues that while there was no evidence that the notice was on the ship, there also was no evidence that the notice was not on the ship. Thus,

according to Chevron, Great Lakes did not carry its burden of proof. *See Hercules Carriers, Inc.*, 768 F.2d 1564.

Chevron, however, mischaracterizes the district court's holding. In the district court's opinion, the question of the Notice to Mariners does not form the basis of the negligence proven by Great Lakes, but instead goes to privity, an issue on which Chevron has the burden of proof. The negligence found by the district court is in the fact that Chevron allowed the master of its ship to sail into "unfamiliar waters" "completely unaware" of the dangers that lay in its path. 613 F. Supp. at 1437. Having made this finding of negligence (which is supported by the record), the district court turned to the issue of privity. The burden was then on Chevron to prove that it was unaware of the potential problem. On that issue, the district court looked to adequacy of the distribution system for maritime notices and found it lacking. Because the district court ruled that Chevron should have been aware of the faults in its information dissemination system, the court ruled that Chevron was not entitled to limit its liability. *Id.* After having reviewed the record, and taking into account the shifting burdens of proof, we cannot say that the district court was clearly erroneous in any of its findings on this point. We thus affirm the denial of Chevron's complaint seeking to limit its liability.[15]

V. CONCLUSION

For the reasons discussed above, we affirm in part and reverse in part the judgment of the district court, and we

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[15] Both the Chevron Transport Corporation, the owner of the Robert Watt Miller, and the Chevron Shipping Company, the managing agent responsible for the operation of the ship, have sought to limit their liability. Because of our affirmance of the district court on this point, we do not reach the question of when, if ever, a managing agent can utilize the Limitation of Liability Act. *See In re Amoco Transport Co.*, 1979 A.M.C. 1017 (N.D. Ill. 1979) (refusing to permit managing agent to limits its liability).

remand this case for further proceedings in accordance with this opinion.

AFFIRMED in part, REVERSED in part, and kE-MANDED.

Supreme Court, U.S.
FILED
OCT 21 1992
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No. 92-506

In The

Supreme Court of the United States

October Term, 1992

CHEVRON TRANSPORT CORPORATION
AND CHEVRON SHIPPING COMPANY,

Petitioners,

versus

GREAT LAKES DREDGE & DOCK COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the filing of only a suggestion of a rehearing in banc with a United States court of appeals tolls the ninety day period for filing a petition for writ of certiorari.

2. Whether a general maritime law settlement bar rule precludes a joint tortfeasor from seeking contribution from another joint tortfeasor who has settled with the injured party.

LIST OF PARTIES

The following companies are parties to the proceeding sought to be reviewed. Petitioners, Chevron Transport Corporation, and Chevron Shipping Company, and Respondent, Great Lakes Dredge & Dock Company. The following have ratified the action of Great Lakes Dredge & Dock Company and are intended beneficiaries of its action:

The Travelers Indemnity Company
Certain Underwriters at Lloyds, London
Orion Insurance Company, Ltd.
English & American Insurance Co., Ltd.
Economic Insurance Co., Ltd.
British Traders Insurance Co., Ltd.
Andrew Weir Insurance Co., Ltd.
British Law Insurance Co., Ltd.
Minister Insurance Co., Ltd.
Edinburgh Assurance Co., Ltd.
The Planet Assurance Co., Ltd.
Fine Art & General Insurance Co., Ltd.
Elders Insurance Co., Ltd.
Threadneedle Insurance Co., Ltd.
Sphere-Drake Insurance Co., Ltd.
The British Fire Insurance Co., Ltd.
London & Hull Insurance Co., Ltd.
Cornhill Insurance Co., Ltd.
Sovereign Marine & General Insurance Co., Ltd.
The Tokio Marine & Fire Insurance Co. (U.K.) Ltd.
Tashio Marine & Fire Insurance Co. (U.K.) Ltd.
Scottish Lion Insurance Co., Ltd.
Bishopgate Insurance Limited
New Zealand Insurance Co. (U.K.) Ltd.

LIST OF PARTIES – Continued

Provincial Insurance Co., Ltd.
Liverpool Marine & General Insurance Co., Ltd.
United Standards Insurance Co., Ltd.

The following companies are related to the parties: Chevron, Inc. d/b/a Standard Oil of California; Chevron U.S.A., Blackstone Family Investment Partnership; Blackstone Dredging Partnership; Great Lakes Dredge & Dock Corporation; Great Lakes International, Inc. and the Travelers Insurance Company. Itel Corporation, identified in Chevron's Petition as Intel, Inc., no longer holds any ownership interest in Great Lakes International, Inc. or indirectly in Great Lakes Dredge & Dock Company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

REFERENCE TO OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. Petition Is Jurisdictionally Out of Time 4

II. No True Conflict Among Circuits 10

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Associated Elec. Coop., Inc. v. Mid-America Transp. Co., 931 F.2d 1266 (8th Cir. 1991) 18

Cooper Stevedoring Company, Inc. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) ..... *passim*

Donovan v. Robbins, 752 F.2d 1170 (7th Cir. 1985) 15

Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER, 957 F.2d 1575 (11th Cir. 1992) 1, 16, 18

Hardy v. Gulf Oil Corp., 949 F.2d 826 (5th Cir. 1992) 17, 18

In Re Oil and Gas Litigation, 967 F.2d 489 (11th Cir. 1992) 13

In Re Oil Spill by the AMOCO CADIZ, 954 F.2d 1292 (7th Cir. 1992) 17, 18

Miller v. Christopher, 887 F.2d 902 (9th Cir. 1989) 18

Stanley v. Bertram-Trojan, Inc., 781 F. Supp. 218 (S.D. N.Y. 1991) 18

The Alabama, 92 U.S. 695 (1876) 11, 14

United States v. Reliable Transfer Co., Inc., 421 U.S. 397 (1975) ..... *passim*

RULES

Supreme Court Rule 13.4 ..... 3, 8

Supreme Court Rule 7 10

Federal Rules of Appellate Procedure Rule 35(b) ... 2, 3, 4

Federal Rules of Appellate Procedure Rule 40 ..... 2, 6

TABLE OF AUTHORITIES – Continued

Page

Eleventh Circuit's Rules, Rule 35-6 9

Eleventh Circuit's Rules, Rule 35-8 9

OTHER AUTHORITIES

Boskey & Gressman, *The Supreme Court's New Rules for the Nineties*, 110 S.Ct. (Interim Edition) *749, 766* (1989) 8

Comments to 12 U.L.A. § 6, at 57 (1992 Supp.) 15

Uniform Comparative Fault Act, 12 U.L.A. § 6, at 56 (1992 Supp.) 16

Uniform Contribution Among Tortfeasors Act, 12 U.L.A. § 4, at 98-100 (1975) 16

REFERENCE TO OPINIONS BELOW

The opinions below were omitted in the Petition for Writ of Certiorari:

1. A complete copy of the June 23, 1992 Order by the Eleventh Circuit, denying Chevron's Suggestion of Rehearing In Banc (SA.4).[1]

2. Opinion of July 19, 1985 of the United States District Court for the Middle District of Florida, Jacksonville Division, *Complaint of Chevron Transport Corporation*, 613 F. Supp. 1428 (M.D. Fla. 1985).

3. Opinion of September 27, 1982 of the United States Court of Appeals for the Eleventh Circuit, *Ebanks v. Great Lakes Dredge & Dock Company*, 688 F.2d 716, 1983 A.M.C. 2941 (11th Cir. 1982).

4. The unofficial citation to the Opinion of April 16, 1992 of the Eleventh Circuit, *Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d 1575 (11th Cir. 1992), is 1992 A.M.C. 2311.

5. The unofficial citation to the Order dated April 16, 1990 of the United States District Court for the Middle District of Florida, Jacksonville Division, is 1990 A.M.C. 2247 (M.D. Fla. 1990).

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[1] The Appendix included with the Petition for Writ of Certiorari contains three documents. Great Lakes believes that ready reference to additional documents is necessary to allow the Court to consider fully the issues raised by the Petition. Consequently, a Supplemental Appendix containing additional documents is included with this brief.

6. The unofficial citation to the Opinion of December 1, 1987 of the United States Court of Appeals for the Eleventh Circuit, *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), is 1988 A.M.C. 2278.

JURISDICTION

Jurisdiction, as prescribed by the rules of this Court, has not been properly invoked by the filing of Chevron's Petition for a Writ of Certiorari 158 days after the entry of the judgment for which review is requested. The judgment of the Court of Appeals for the Eleventh Circuit was entered on April 16, 1992. While Chevron timely made a suggestion to the Eleventh Circuit for rehearing in banc pursuant to Rule 35(b), Fed. R. App. P., which was denied by the Eleventh Circuit on June 23, 1992, Chevron never filed a petition for rehearing pursuant to Rule 40, Fed. R. App. P. *See* Sup. Ct. R. 13.4.

STATEMENT OF THE CASE

Great Lakes cannot agree with many of the representations and purported facts set forth in Chevron's Statement of the Case; however, only one such statement bears directly upon this Court's consideration of Chevron's Petition for Writ of Certiorari. Contrary to Chevron's assertions that "a timely petition for rehearing *en banc* . . . was denied . . . ," it never filed a petition for rehearing of the Eleventh Circuit's April 16, 1992 judgment. Rather, Chevron only made a suggestion for rehearing in banc pursuant to Rule 35(b), Fed. R. App. P.

SUMMARY OF THE ARGUMENT

I. ISSUE 1

Chevron's Petition for Writ of Certiorari is jurisdictionally out of time. The judgment of the Court of Appeals for the Eleventh Circuit was entered on April 16, 1992. While Chevron timely made a suggestion for rehearing in banc pursuant to Rule 35(b), Fed. R. App. P., which was denied on June 23, 1992, Chevron never filed a petition for rehearing. As the filing of Chevron's Suggestion for Rehearing In Banc alone did not toll the ninety day period prescribed for filing a petition for writ of certiorari, *see* Sup. Ct. R. 13.4, the filing on September 21, 1992 of the Petition for Writ of Certiorari was jurisdictionally out of time.

II. ISSUE 2

Great Lakes contends that no true conflict presently exists among the circuits concerning contribution from a settling maritime tortfeasor. While there are three generally recognized, potential methods for addressing the issue, not all are in conflict with one another. Rather, when compared with the Supreme Court principles underlying maritime contribution, it becomes clear that the first and third methods, as identified in Chevron's writ petition, conflict only with the second approach and not with one another. Since no United States court of appeals has adopted the second method exclusively, there presently is no true conflict among the circuits.

ARGUMENT

There are two reasons for denying Chevron's Petition for Writ of Certiorari. First, Chevron's Petition is jurisdictionally out of time. Secondly, while there is the potential for conflict among the circuits concerning contribution against a settling maritime joint tortfeasor, there presently is no true conflict concerning this issue.

I. PETITION IS JURISDICTIONALLY OUT OF TIME

Chevron's Petition for Writ of Certiorari is jurisdictionally out of time. Rule 13.4 of the Rules of the Supreme Court of the United States provides in part:

> The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered. . . . However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. *A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.* (emphasis added).

In this case, the Eleventh Circuit rendered judgment on April 16, 1992, and Chevron, after obtaining an extension of time, made a suggestion for rehearing in banc on May 13, 1992, which was denied by the Eleventh Circuit on June 23, 1992. A petition for rehearing was never filed by Chevron. Since the filing of a suggestion for rehearing in banc alone does not toll the ninety day period to file a

writ of certiorari, Chevron's filing of the petition for writ of certiorari on September 21, 1992, 158 days after entry of judgment, was jurisdictionally out of time.

In its Petition for Writ of Certiorari, Chevron effectively represents that it filed both a suggestion for rehearing in banc and a petition for rehearing. Nevertheless, the court of appeals' record reveals that Chevron never filed a petition for rehearing, either (1) as a separate document, or (2) combined with its Suggestion for Rehearing In Banc. Rather, the record reflects that Chevron filed a suggestion for rehearing in banc and a suggestion for rehearing in banc only.

A review of Chevron's Suggestion for Rehearing In Banc (SA.5) reveals that a petition for rehearing was not combined with Chevron's Suggestion. In fact, the language "petition for rehearing" never appears in Chevron's Suggestion. Rather, all references are to a suggestion for rehearing in banc. The following quotes in Chevron's Suggestion are illustrative:

> 1. The cover page is entitled simply "CHEVRON'S SUGGESTION FOR REHEARING *EN BANC*." (SA.5p. 1b)
>
> 2. The "STATEMENT REGARDING EN BANC CONSIDERATION" provides in part "that consideration by the full court is necessary. . . . " (SA.5p. 4b)
>
> 3. The issue is stated as "EN BANC CONSIDERATION IS WARRANTED BECAUSE. . . . " (SA.5p. 7b)
>
> 4. The last sentence of the statement of the case prays "Chevron seeks en banc review of the panel's decision." (SA.5p. 11b)

5. The first sentence of the argument emphasizes "The panel's disposition of the issue before it invokes every concern that this Circuit has identified as warranting its *en banc* review." (SA.5p. 12b)

6. The last sentence of the argument declares "It [the panel's decision] should therefore be reconsidered by the Court *en banc*." (SA.5p. 23b)

7. The conclusion consists of one sentence which provides "For the foregoing reasons, Chevron respectfully requests *en banc* rehearing of the panel's decision." (SA.5p. 23b)

It also is clear from the tone and tenor of the Suggestion for Rehearing In Banc that Chevron neither contemplated nor sought a panel rehearing. Chevron's Suggestion did not even attempt, as required by Rule 40, Fed. R. App. P., to direct the panel to points of law or fact which it had overlooked. Indeed, none of the argument contained in the Suggestion was directed to the panel. To the contrary, rather than appealing to the panel to reconsider its decision, Chevron leveled a succession of charges at the panel and its decision, characterizing the decision as "senseless" (SA.5p 7b) and accusing the panel of having "abandoned" the circuit's established law (SA.5p. 12b), having "cavalierly pushed aside" authorities (SA.5p. 16b), and having effected a "radical digression from policies" and "basic precepts" of, among other things, "fairness." (SA.5p. 12b). The panel was further charged with having been guilty of "acute insensitivity" and being detached from the practical ramifications of its decision, all the while at the same time refusing to acknowledge reality. (SA.5p. 17b). All in all, the tone and tenor of Chevron's argument was hardly the metal from

which an appeal to the panel would have been hammered.

That a petition for rehearing was never filed is demonstrated further by Chevron's own characterizations in other documents of its Suggestion for Rehearing In Banc. On May 13, 1992, Chevron submitted a letter of supplemental authority to the Eleventh Circuit (SA.6), stating "Please note that this letter relates to Chevron's Suggestion of Rehearing *En Banc* filed on May 14, 1992, and should be distributed to all Judges of the Circuit." The May 13th letter further suggests "[T]he language . . . [of the case submitted as supplemental authority] supports Chevron's position throughout its Suggestion of Rehearing *en banc*. . . . " Likewise, in its Motion for Stay of Mandate, date June 29, 1992 (SA.7), Chevron noted:

> "1. CHEVRON filed its Suggestion of Rehearing *En Banc* from this Court's opinion on May 14, 1992.
>
> 2. In an Order, dated June 23, 1992, this Court denied CHEVRON's Suggestion of Rehearing *En Banc.*"

The first time Chevron's Suggestion for Rehearing In Banc is referred to by any language other than "suggestion for rehearing in banc" is Chevron's Motion for Reconsideration of the Motion for Stay, dated July 23, 1992 (SA.8). It must be emphasized, however, that that motion also is the first time Chevron mentions Rule 13.4 of the Rules of the Supreme Court of the United States.

Similarly, the June 23 Order (SA.4) itself does not necessarily recite that Chevron filed a petition for rehearing. Rather, the standard form on which the Order was issued consisted of three separate paragraphs, with a

judge indicating his or her reasons for decision by placing an "X" next to the appropriate paragraph. There, however, was no paragraph relating to the situation where, as here, no petition for rehearing had been filed and the suggestion for rehearing in banc had been denied with no member of the panel or other judge in regular service requesting a rehearing.

Despite having failed to file a petition for rehearing, Chevron, nonetheless, contends that its Suggestion for Rehearing In Banc has the "operational effect" of a petition for rehearing under the Eleventh Circuit's local rules.[2] Chevron, however, cannot supplant the Rules of the Supreme Court of the United States by bootstrapping the local rules and standard forms of an inferior federal court. The Rules of the Supreme Court are superior to the local rules of the lower courts, and should operate uniformly without the necessity for reference to, and construction of, local court rules. Rule 13.4 of the Rules of the Supreme Court clearly and expressly provides that a suggestion for rehearing in banc "is not a petition for rehearing within the meaning of this Rule." The purpose of the 1990 amendment was to establish a uniform, bright line rule, which clarified the previous confusion as to whether a suggestion for rehearing in banc tolled the 90 day period for filing writ petitions. Boskey & Gressman, *The Supreme Court's New Rules for The Nineties,* 110 S. Ct.

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[2] Chevron's contentions were not mentioned in its Petition for Writ of Certiorari. Rather, they were noted in a letter dated September 17, 1992 from counsel for Chevron to counsel for Great Lakes. (SA.9) Chevron's writ petition was filed on September 21, 1992.

(Interim Edition) *749, 766* (1989). If Chevron's contention is accepted, the pre-1990 confusion would reappear, since Rule 13.4 would have no effect in cases arising from the Eleventh Circuit or any other United States court of appeals with similar local rules or standard forms. This would soon destroy uniformity of application and result in this Court's having to analyze and construe the different local rules of the thirteen circuits to determine the timeliness of writ petitions.

Great Lakes submits that the matter should rest with the uniform application of this Court's clearly expressed rule. But beyond this, the Eleventh Circuit local rules neither state nor imply that a suggestion for rehearing in banc shall have the operative effect of a petition for rehearing. While Eleventh Circuit local Rule 35-6 does say that "A suggestion of rehearing en banc will . . . be treated as a petition for rehearing . . . ," Eleventh Circuit Rule 35-8 and the Circuit's Internal Operating Procedures ("I.O.P.") dispel any notion that Eleventh Circuit Rule 35-6 converts suggestions for rehearing in banc into petitions for rehearing.[3] Eleventh Circuit Rule 35-8 permits suggestions of rehearing in banc to be combined with petitions for rehearing, and the I.O.P. makes clear that petitions for rehearing are still contemplated and may be either combined with a suggestion of rehearing in banc or filed separately.[4]

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[3] Rules 35-6 and 35-8 and the relevant I.O.P. of the Eleventh Circuit are attached (SA.10).

[4] The I.O.P. provides, in part:

1. *Time and Form.* A suggestion for rehearing en banc, whether or not combined with a petition for

Finally, Chevron asserts that a Supreme Court docket clerk advised that the Eleventh Circuit's rules and standard form order have the operative effect of a petition for rehearing. Chevron, however, could not have reasonably relied on any such statement. Rule 7, Sup. Ct. R., prohibits employees of the Clerk's office from rendering legal advice. The Justices of the Court ultimately determine the proper effect of the Rules, not the Clerk's office.

II. NO TRUE CONFLICT AMONG CIRCUITS

There presently exists no true conflict among the circuits concerning contribution against a settling maritime tortfeasor and no certainty that one will ever crystalize. While there are three generally recognized, potential methods for addressing the issue, not all are in conflict with one another. The first (recognized by the court below) and third methods identified and listed in Chevron's Petition conflict only with the second potential approach and not with one another. The first and third methods are in harmony with established maritime law principles as announced by this Court while the second is not. Therefore, since no circuit has adopted the second approach exclusively, no true conflict presently exisis among the circuits concerning contribution against a settling maritime tortfeasor.

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rehearing is timely only if received by the clerk within 21 days of entry of judgment.

2. *Length.* A suggestion of rehearing in banc, whether or not filed with a petition for rehearing, is limited to 15 pages. . . .

Great Lakes begins, as did the Eleventh Circuit below, with the applicable Supreme Court precedent. Contrary to Chevron's contention, *Cooper Stevedoring Company, Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 109-115 (1974), and *United States v. Reliable Transfer Company, Inc.*, 421 U.S. 397, 401-08 (1975), provide conclusive guidance in determining whether contribution is permitted from a settling maritime tortfeasor.

In *Cooper Stevedoring*, this Court reaffirmed that, as a matter of general maritime law, a joint tortfeasor was entitled to contribution against another tortfeasor. In announcing this decision, the Court identified the principles underlying maritime contribution as (1) a more equal distribution of justice, and (2) safety (deterrence).

> Even though the common law of torts rejected a right of contribution among joint tortfeasors, the principal of division of damages in admiralty has, over the years, been liberally extended by this Court in directions deemed just and proper. . . . Indeed, it is fair to say that application of the rule of division of damages between joint tortfeasors in admiralty cases has been as broad as its underlying rationales. The interest of safety dictate that where two parties 'are both in fault, they should bear the damage equally, to make them more careful.' The Alabama, *supra*, 92 U.S. [695] at 697 [(1876)] and a 'more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrong doers to bear the entire loss, though the other may have been equally or

> more to blame. See The Max Morris, *supra*, 137 U.S. [1] at 14, 11 S. Ct. [29] at 32 [(1890)].

417 U.S. at 110-11.

In *United States v. Reliable Transfer Company, Inc.*, 421 U.S. 397 (1975), the second of the *Cooper Stevedoring* underpinnings – the quest for a more equal distribution of justice – was the foundation of the analysis that accompanied the rejection of equally divided damages in favor a rule which apportions damages in relationship to a person's degree of causative fault. *Id.* at 401-11. An "ancient form of rough justice" with its propensity to produce "palpable unfair results" was restructured with a view toward enhancing the fundamental fairness of the final judicial result. *Id.* at 403-07.

The defendant in *Reliable Transfer* had argued that the apportionment of fault doctrine would frustrate settlements. In rejecting this contention, this Court observed:

> [T]he [defendant's] argument is hardly persuasive. For if the fault of the two parties is markedly disproportionate, it is in the interest of the slightly negligent party to litigate the controversy in the hope that . . . a court [will] . . . absolve it of all liability. . . . But even if this argument were more persuasive than it is, it could hardly be accepted. For, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements. . . .

Id. at 408.

The longstanding commitment of the admiralty courts to comparative fault and to promoting safety at sea and other navigable waters makes the general maritime

law unique. Nonmarine cases and commentary relating to contribution and settlement, therefore, may or may not be persuasive authority in a maritime case, depending upon the public policy considerations involved. *See, e.g., In Re Oil and Gas Litigation,* 967 F.2d 489, 494 n.3 (11th Cir. 1992) (general maritime law rules concerning contribution and settlement inapplicable in class action).

Being guided by the maritime law principles underlying *Cooper Stevedoring* and *Reliable Transfer,* it becomes clear that there presently exists no conflict among the circuits in cases involving settling maritime tortfeasors. As noted in Chevron's Petition for Writ of Certiorari, the three generally accepted methods for dealing with contribution against settling tortfeasor are:

> (1) Awarding the plaintiff his full damages against the non-settling tortfeasor (less the sum he received in settlement) and allowing an action for contribution against a settling tortfeasor by any other tortfeasor who has paid more than his equitable share of the plaintiff's claim;
>
> (2) Awarding plaintiff his full damages in the same manner as in approach one *but* imposing a bar to contribution claims against a settling tortfeasor, perhaps in conjunction with a requirement that the settlement be in 'good faith,' and
>
> (3) Reducing the claim of the plaintiff to the pro-rata share of a settling tortfeasor's liability for damages, which has the effect of eliminating any reason to sue a settling tortfeasor for contribution.

Chevron's Petition for Writ of Certiorari at 9-10.

The principles underlying methods one and three are consistent with one another. The principle of a more equal distribution of justice is effectuated by methods one and three since neither method would result in a non-settling tortfeasor's paying more than his adjudicated proportionate share of a judgment or settlement. Likewise, the principle of safety is promoted by both methods. No principle is more firmly entrenched in the maritime law than that comparative fault precepts promote safety by focusing the most deterrent effect on the party most responsible for the harm. *See, e.g., United States v. Reliable Transfer Co.*, 421 U.S. 397, 405 n. 11 (1975); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 110-11 (1974); *The Alabama*, 92 U.S. 695, 697 (1876).

Chevron argues that the first and third methods conflict because the third method allegedly promotes settlements more than the first approach. Nevertheless, properly analyzed the third approach does not promote settlements any more than does the first approach. The same protection which a settling tortfeasor obtains under the third approach – the buying of his peace – also is available under the first approach. It is only a matter of appropriately conditioning the terms of the settlement documents.[5]

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[5] By way of example, the Supplementary Appendix includes an extract from a release actually utilized in concluding the settlement by two alleged joint tortfeasors of a case governed by the general maritime law while permitting the claimants to reserve and retain their rights against at least one non-settling joint tortfeasor. (SA.11).

Additionally, under the third approach, the plaintiff bears the burden of a "bad settlement." A plaintiff stands to receive less than he would by going to trial, if the amount of the settlement is less than or equal to the amount of damages attributable to the settling defendant's adjudicated proportion of fault. *See* Comments to 12 U.L.A. § 6, at 57 (1992 Supp.).

Chevron also implies that the first and third approaches are inconsistent because the third method precludes a non-settling tortfeasor from seeking contribution against a settling tortfeasor. Under the third method, however, a non-settling tortfeasor receives a credit against the plaintiff for that percentage of the judgment corresponding to the settling defendant's degree of fault. Contribution, therefore, is not necessary because this credit protects the non-settling defendant from paying more than its proportionate share of the judgment.

By sharp contrast to approaches one and three, approach two conflicts not only with the principles underlying maritime contribution but with the other two approaches. Method two clearly violates the principle of "a more equal distribution of justice." Under the second method, a non-settling tortfeasor could be forced to bear a substantially greater amount of a loss, even though it was less culpable, simply by virtue of the plaintiff's decision to settle with the other tortfeasor. This type of result was among the reasons why the common law rule of no contribution was objectionable and was rejected by this Court in *Cooper Stevedoring*. As noted by the United States Court of Appeals for the Seventh Circuit in *Donovan v. Robbins*, 752 F.2d 1170, 1181 (7th Cir. 1985):

> [The second approach] would be contrary to the spirit of contribution, since it would allow guiltier defendants to get off cheaply by settling first. The consequences of the race to settle to the losers of the race are among the reasons for finding the old common law rule of no contribution objectionable.

The second method also would frustrate the principle of safety (deterrence). If maritime defendants can avoid their true measure of liability by entering into quick, partial settlements, the deterrent effect of comparative fault will be negated. If, however, maritime tortfeasors must respond for their degree of fault, they would be more careful, resulting in fewer injuries. *See, e.g., Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER,* 957 F.2d 1575, 1581-82 (11th Cir. 1992).

Chevron maintains that the second approach promotes settlements more than the first and third approaches. While Chevron's position may have been persuasive in 1955, experience and logic have demonstrated otherwise.

The experience of the drafters of the uniform laws is instructive. Originally, the Uniform Contribution Among Tortfeasors Act allowed contribution against a settling tortfeasor. The Act, however, was amended in 1955, precluding contribution. 12 U.L.A. § 4(b), at 98 (1975). The 1955 amendment resulted in large part from the drafter's belief that the second method would promote settlements. *Id.* at 99-100. Nevertheless, in 1977, the drafters of the uniform laws changed their opinions, adopting the third approach, Uniform Comparative Fault Act, 12 U.L.A § 6, at 56 (1992 Supp.), in part because experience had

demonstrated that the second approach did not promote settlements. The comments to the 1977 Act provide in part: "While . . . [the second approach] theoretically encourages settlement, it may be unfair to the other defendants and if the good-faith requirement is conscientiously enforced, settlement may be discouraged." *Id.* at 57. Any reference to the 1977 Act is conspicuously absent from Chevron's Petition for Writ of Certiorari, as well as from the recent court of appeals decisions in *In Re Oil Spill by the AMOCO CADIZ*, 954 F.2d 1292, 1314-18 (7th Cir. 1992), and *Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 835-36 (5th Cir. 1992).

Additionally, logic demonstrates that the second approach promotes quick, partial, unjust settlements, rather than compromise of the entire case. Once a plaintiff settles with one defendant, the claimant no longer has any incentive to settle with the non-settling defendant, since the plaintiff need only to establish one percent of fault on the part of the non-settling co-defendant to recover the entire judgment. This lack of incentive will delay the ultimate disposition of law suits, contrary to the goal of full and complete settlements. *Cf. Reliable Transfer*, 421 U.S. at 408 ("[I]f the fault of the two parties is markedly disproportionate, it is in the interest of the slightly negligent party to litigate the controversy in the hope that . . . a court [will] . . . absolve it of all liability. . . . ").

Even if the first and third methods did have a slight deterrent effect on full and complete settlements, this Court, contrary to Chevron's assertions, has expressed a preference for the principle of a more equal distribution

of justice. "[The argument against comparative fault] asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation." *Reliable Transfer,* 421 U.S. at 408, *quoted in Great Lakes,* 957 F.2d at 1582.

A review of the maritime decisions by the United States courts of appeals reveals that no circuit has adopted the second method exclusively. Rather, the circuits have adopted the first or third approach exclusively or combinations of the three approaches. *Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER,* 957 F.2d 1575, 1581-83 (11th Cir. 1992) (adopting the first approach); *In Re Oil Spill by the AMOCO CADIZ,* 954 F.2d 1279, 1314-18 (7th Cir. 1992) (rejecting the third approach but not deciding between the first and second approaches); *Hardy v. Gulf Oil Corp.,* 949 F.2d 826, 835-36 (5th Cir. 1992) (rejecting the first approach but not taking a position between the second and third approaches); *Associated Elec. Coop., Inc. v. Mid-America Transp. Co.,* 931 F.2d 1266, 1271 (8th Cir. 1991) (adopting the third approach); *Miller v. Christopher,* 887 F.2d 902, 903-07 (9th Cir. 1989) (rejecting the first approach but not deciding between the second and third approaches). *Stanley v. Bertram-Trojan, Inc.,* 781 F. Supp. 218, 221-26 (S.D. N.Y. 1991), cited by Chevron as a second-approach case, actually adopted the second or third approaches, depending upon which method is most favorable to the non-settling defendant.

There presently exists no true conflict among the circuits concerning contribution against a settling maritime tortfeasor. If a United States court of appeals ever adopts just the second approach in a maritime case, this Court's review then would be warranted because a true

conflict then would exist not only among the circuits, but also with the Supreme Court principles underlying maritime contribution. This, however, is neither the case nor the time to resolve that hypothetical conflict.

CONCLUSION

There are two reasons why the petition for Writ of Certiorari should be denied. First, Chevron's Petition is jurisdictionally out of time. Secondly, while there is a potential for conflict among the circuits concerning contribution against a settling maritime tortfeasor, there presently is no true conflict concerning this issue. Accordingly, Great Lakes respectfully requests this Court to deny Chevron's Petition for Writ of Certiorari.

Respectfully submitted,

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LIST OF APPENDICES

1. SA.4. . . . . June 23 Order
2. SA.5. . . . . Suggestion for Rehearing En Banc
3. SA.6. . . . . Letter of Supplemental Authority
4. SA.7. . . . . Motion for Stay of Mandate
5. SA.8. . . . . Motion for Reconsideration
6. SA.9. . . . . Letter September 17
7. SA.10. . . . . Eleventh Circuit's Local Rules and I.O.P.
8. SA.11. . . . . Sample Settlement Document Language

SA.4

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 23 1992
MIGUEL J. CORTEZ
CLERK

No. 90-3466

GREAT LAKES DREDGE & DOCK COMPANY,

Plaintiff-Appellant,

versus

TANKER ROBERT WATT MILLER,

Defendant-Appellee.

Complaint of CHEVRON TRANSPORT CORPORATION, as owner of the S/S ROBERT WATT MILLER, in an action for exoneration from or limitation of liability,

Plaintiff.

GREAT LAKES DREDGE & DOCK CO., a corporation,

Plaintiff-Appellant,

versus

CHEVRON SHIPPING COMPANY and ITALIA SOCIETE PER AZ DI NAV.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion April 16, 1992, 11th Cir., 19__, ____ F.2d ____).

BEFORE COX and DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s)) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request on one of the members of the Court and a majority of the circuit judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

2a

SA.5

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

CASE NO. 90-3466

On Appeal From The United States District Court
For the Middle District of Florida,
Jacksonville Division

GREAT LAKES DREDGE & DOCK COMPANY,

Plaintiff/Appellant,

- versus -

CHEVRON SHIPPING COMPANY, et al.,

Defendants/Appellees.

CHEVRON'S SUGGESTION FOR REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE

The undersigned, counsel of record for the appellee, certifies in accordance with 11th Cir. R. 28-2(b) that the following contains a complete list of the trial judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party.

Boghraty, Babak	Attorney for Appellee
Bolz, Henry H., III	Attorney for Appellee
Chevron Corporation	Corporate parent of Chevron Shipping Co. and Chevron Transport Corporation
Chevron Shipping Company	Appellee
Chevron Transport Corporation	Appellee
Great Lakes Dredge & Dock Company	Appellant
Great Lakes International, Inc.	Corporate parent of Great Lakes Dredge & Dock Company
Faris, Ellis, Cutrone & Gilmore	Attorneys for Appellant
Faris, Warren M.	Attorney for Appellant
Fowler, White, Gillen, Boggs & Villareal	Attorneys below for Appellant

Futrell, John M.	Attorney for Appellant
Itel Corporation	Corporate parent of Great Lakes International, Inc.
Kelley Drye & Warren	Attorneys for Appellee
Kops, John M.	Attorney for Appellant
Melton, Howell W., Honorable	Trial judge in earlier proceeding
Stanton, Courtney Wilder	Attorney for Appellant
Sullivan & Vlcek	Attorneys for Appellee
Thomas, Daniel H., Honorable	Trial judge, sitting by designation in earlier proceeding
Travelers Indemnity Company	Appellant's primary protection-and-indemnity insurer
Underwriters at Lloyd's and Insurance Companies, severally subscribing to Policy No. 36/103	Appellant's excess protection-and-indemnity insurers
Villareal, Dewey, R., Jr.	Attorney below for Appellant
Vlcek, Alan B.	Attorney for Appellee

CORPORATE DISCLOSURE STATEMENT

Chevron Corporation

STATEMENT REGARDING EN BANC CONSIDERATION

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following precedent of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: ***Self v. Great Lakes Dredge & Dock Co.,*** 832 F.2d 1540 (11th Cir. 1981)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one question of exceptional importance:

> THE PANEL OPINION EXPLICITLY REJECTS THE SETTLEMENT BAR RULE, WHICH WAS ENUNCIATED AS THE LAW OF THIS CIRCUIT IN ***SELF,*** AND UNANIMOUSLY RECOGNIZED AS SUCH BY OTHER COURTS AND COMMENTATORS – IN FAVOR OF A SENSELESS AND MUCH-CRITICIZED RULE WHICH UNDULY IMPEDES SETTLEMENTS WITH THE INJURED PLAINTIFF AND WASTES JUDICIAL RESOURCES BY ALLOWING CONTRIBUTION BY AND AGAINST A SETTLING TORTFEASOR.

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TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE i

STATEMENT REGARDING EN BANC CONSIDERATION..... iii

TABLE OF CONTENTS..... iv

TABLE OF AUTHORITIES..... v

STATEMENT OF THE ISSUES 1

STATEMENT OF FACTS, COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE..... 1

ARGUMENT 5

EN BANC CONSIDERATION IS WARRANTED BECAUSE THE PANEL OPINION EXPLICITLY REJECTS THE SETTLEMENT BAR RULE, WHICH WAS ENUNCIATED AS THE LAW OF THIS CIRCUIT IN ***SELF,*** AND UNANIMOUSLY RECOGNIZED AS SUCH BY OTHER COURTS AND COMMENTATORS – IN FAVOR OF A SENSELESS AND MUCH-CRITICIZED RULE WHICH UNDULY IMPEDES SETTLEMENTS WITH THE INJURED PLAINTIFF AND WASTES JUDICIAL RESOURCES BY ALLOWING CONTRIBUTION BY AND AGAINST A SETTLING TORTFEASOR..... 5

CONCLUSION 15

CERTIFICATE OF SERVICE..... 16

TABLE OF AUTHORITIES

Page

CASES:

Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir. 1981).....14, 15

Donovan v. Robbins, 752 F.2d 1170 (7th Cir. 1985) 13

Ebanks v. Great Lakes Dredging & Dock Co., 688 F.2d 716 (11th Cir. 1982)..... 2

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979).....4, 12

Great Lakes Dredge & Dock Co. v. Miller, No. 90-3466, slip op. (11th Cir. April 16, 1992) 5, 6, 9, 10

In the Matter of Oil Spill By the Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992).....8, 13

Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979).....2-4, 6, 7, 11

Luke v. Signal Oil & Gas Co., 523 F.2d 1190 (5th Cir. 1979) 4

Miller v. Christopher, 887 F.2d 902 (9th Cir. 1989) 7-11, 13

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970)..... 14

Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540 (11th Cir. 1987).....iii, 3-7, 10, 11, 13, 14

United States v. Reliable Transfer Co., 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975).....12, 13

OTHER:

1B Moore's Federal Practice § 0.402[2] 14

12 U.L.A. 99 (1975) 9, 11

12 U.L.A. 100 (1975) 8

33 U.S.C.A. § 901 12

STATEMENT OF THE ISSUE

EN BANC CONSIDERATION IS WARRANTED BECAUSE THE PANEL OPINION EXPLICITLY REJECTS THE SETTLEMENT BAR RULE, WHICH WAS ENUNCIATED AS THE LAW OF THIS CIRCUIT IN ***SELF,*** AND UNANIMOUSLY RECOGNIZED AS SUCH BY OTHER COURTS AND COMMENTATORS – IN FAVOR OF A SENSELESS AND MUCH-CRITICIZED RULE WHICH UNDULY IMPEDES SETTLEMENTS WITH THE INJURED PLAINTIFF AND WASTES JUDICIAL RESOURCES BY ALLOWING CONTRIBUTION BY AND AGAINST A SETTLING TORTFEASOR.

STATEMENT OF FACTS, COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

On February 5, 1975, the tanker, the M/V "ROBERT WATT MILLER," owned by Chevron Transport Corp. and managed by Chevron Shipping Corp. (collectively "Chevron"), collided with the dredge "ALASKA" owned by Great Lakes Dredge & Dock Co. ("Great Lakes") in the St. Johns River, in Jacksonville, Florida. Eight crew members aboard the "ALASKA" were injured, and two others were killed.

The personal injury and death claimants filed separate actions against Great Lakes under the Jones Act and general maritime law. They also sued Chevron. Great Lakes in turn filed third-party complaints against Chevron for indemnity and/or contribution for any sums which Great Lakes might become liable to pay on account of the personal injury and death claims.

Chevron settled all of the personal injury and death claims brought against it for the total sum of $707,800, the last of such settlements being entered into on May 29, 1979. Chevron obtained full and complete releases from each of the claimants for any injuries, damages and/or claims sustained by them arising out of the collision. Each of the settlements was approved by the district court after notice to Great Lakes and discharged Chevron from any other or further liability arising out of the collision.

Great Lakes declined to settle the claims against it, and those claims were tried to a jury in Jacksonville, Florida, on June 1, 1979. Prior to the trial, the claimants amended their complaints against Great Lakes to add claims for punitive damages for various safety violations. The court severed the third-party actions against Chevron for trial at a later date. As a result, Chevron was not a party to the trial.

The claims were submitted to the jury under the theory of ***Leger v. Drilling Well Control, Inc.***, 592 F.2d 1246 (5th Cir. 1979). The jury found that Great Lakes had been negligent; however, its negligence was not a proximate cause of the claimants' losses. The jury found Chevron 100% at fault in the collision. The seamen appealed, and for the reasons set forth in ***Ebanks v. Great Lakes***

Dredging & Dock Co., 688 F.2d 716 (11th Cir. 1982), this Court reversed, and remanded the case for a new trial. On remand, the trial court consolidated for non-jury trial all pending actions, including Great Lakes' third-party claims for indemnity and/or contribution against Chevron.

The second trial began January 28, 1985. By that time, Great Lakes had settled with all the claimants, except Vivian Marie Self, the personal representative of the estate of Danny Joe Self. In addition, the district court had granted Chevron a partial summary judgment on Great Lakes' indemnity claim on the ground that, there being no contractual or other special relationship between Great Lakes and Chevron, Great Lakes was not entitled to indemnity as a matter of law.

At the second trial, Self's claims against Great Lakes were tried as well as liability issues between Great Lakes and Chevron. Self argued that Great Lakes recklessly failed to comply with numerous safety regulations, entitling her to compensatory and punitive damages. Self and Chevron contended that Great Lakes improperly positioned the "ALASKA" and its attendant barge in the channel. Great Lakes alleged that Chevron negligently allowed the M/V "ROBERT WATT MILLER" to proceed through the channel with insufficient information about the location of the dredge and barge. Evidence on these and other claims were presented at trial.

Following the presentation of the evidence, the trial court concluded Great Lakes was 30% responsible and Chevron was 70% responsible for the ***collision.*** It also found Self's total damages to be $661,354.00. Relying on

Leger, 592 F.2d 1246, the court held that Self, who had already settled with Chevron for $315,000, was only entitled to recover a 30% *pro rata* share of her total damages from Great Lakes. The court awarded Self a judgment of $198,406.20 against Great Lakes.

After the entry of the judgment, all three parties – Self, Chevron and Great Lakes – appealed. This Court affirmed in part, reversed in part, and remanded in *Self v. Great Lakes Dredge & Dock Co.,* 832 F.2d 1540 (11th Cir. 1987). Specifically, the Court affirmed, *inter alia,* the partial summary judgment granted to Chevron on Great Lakes' indemnity claim but reversed the trial court's award of damages to Self, rejecting the court's application of *Leger* as inconsistent with the principles of joint and several liability subsequently discussed by the Supreme Court in *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256 (1979). The Court held that Self could recover the full amount of her damages from Great Lakes on a *pro tanto* basis; that is, she could recover the total amount of her damages from Great Lakes, regardless of its percentage of fault in causing the collision, with an appropriate dollar-for-dollar set-off for the settlement sums paid by Chevron. This Court also stated that Chevron's court-approved settlements barred Great Lakes' claims for contribution under the principles of *Luke v. Signal Oil & Gas Co.,* 523 F.2d 1190 (5th Cir. 1979) which were subsequently incorporated in the pro rata liability scheme adopted in *Leger.* The case was remanded for a new trial on damages, including Self's claims for punitive damages.

A third trial on Self's damages was never held. After this Court rendered its opinion in *Self*, Great Lakes settled with Vivian Marie Self for $2,050,000 on April 25, 1988. The settlement brought the total amount of money paid by Great Lakes in settlement of the claims of its crew members to $2,993,199, the amount with respect to which Great Lakes seeks contribution from Chevron. None of the death and personal injury claims against Great Lakes thus were ever adjudicated; rather, they were all settled without a judicial determination of damages.

The district court subsequently entered summary judgment in favor of Chevron on Great Lakes' claims for contribution. Relying on *Self's* adoption of the *pro tanto*/ settlement bar contribution rule, the court held that Chevron's settlements barred the contribution claims of Great Lakes. The court further held that even if Great Lakes was entitled to recover contribution from Chevron, determining the amount of such an award, as a practical matter, would be an impossible task as both parties had settled voluntarily with the claimants. Great Lakes appealed.

On April 16, 1992, a panel of this court reversed, rejecting as dicta that portion of *Self* adopting the settlement bar rule. The panel remanded, leaving to the district court the task of determining again whether the parties' proportionate liability for the claimant's damages, as well as the quantum of those damages, can be determined after 17 years of litigation. Chevron seeks en banc review of the panel's decision.

ARGUMENT

The panel's disposition of the issue before it invokes every concern that this Circuit has identified as warranting its ***en banc*** review. The panel abandoned the established law of this Circuit – which was in line with the overwhelming majority of States – in favor of a rule which no other circuit follows and which has been the subject of intense criticism by courts and commentators alike. Left standing, the precedent created by the panel would represent a radical digression by this Circuit from the policies underlying general maritime law, and basic precepts of fairness, practicality and judicial economy.

The panel held that a tortfeasor who settles with the plaintiff buys no protection from further litigation and liability for the same damage in a subsequent action for contribution, ***Slip Op.***, at 2120. It also held that a tortfeasor who settles with the plaintiff is not bound by the finality of his settlement and may sue another settling tortfeasor on the sole premise that the amount he paid in settlement ***might*** have exceeded his proportionate share of the damages. ***Slip Op.*** at 2122. The startling breadth of this holding becomes apparent in light of its factual underpinnings: Great Lakes and Chevron have both settled with the plaintiffs before a valid assessment of the quantum of plaintiffs' damages or the defendants' percentages of fault. Thus, after seventeen years of litigation which included two trials and two appeals, the panel sent the parties back to the dawn of this controversy to reenact ten personal injury and death trials and determine ***if*** either one of the tortfeasors paid more in settlement than it would have paid had both parties gone to trial. ***Slip Op.*** 2122.

To permit this result, the panel rejected what has been the established rule in this jurisdiction since ***Leger v. Drilling Well Control, Inc.***, 592 F.2d 1246 (5th Cir. 1979): that a settlement with the plaintiff immunizes the settling tortfeasor from further liability for contribution. ***Id.*** at 1248. The settlement bar rule explicit in ***Leger*** was later reaffirmed by this Circuit in ***Self v. Great Lakes Dredge & Dock Co.***, 832 F.2d 1540 (11th Cir. 1981), a prior appeal in this very case.

Self adopted as its own the rule followed by most jurisdictions in this country: a tortfeasor who refuses to settle and instead goes to trial against the plaintiff receives a dollar-for-dollar credit for any amount that the plaintiff received from other tortfeasors in settlement, and must pay the balance of plaintiff's damages as determined at trial without a right of contribution against the settling tortfeasor. ***Self's*** prohibition of contribution against settling tortfeasors was unequivocal:

> We do not overlook the fact that in a case such as this, a joint tortfeasor may be left paying a higher or lower percentage of the damage than it caused. Nor do we overlook the rule that there may be joint contribution in an admiralty case and that ***in the absence of a settlement,*** the amount of contribution turns on the percentage of fault of each tortfeasor. ***Leger*** upheld that 'settling defendants are relieved of any further liability to the Plaintiff.' ***It is obvious that the rule announced in Luke [and Leger] overrides the right of contribution.***

Self, 832 F.2d at 1547 (emphasis added, footnote and citations omitted, quotation from ***Leger,*** 592 F.2d at 1248).

The logic of barring contribution against a settling tortfeasor is clear: a tortfeasor who settles seeks to avoid the cost of additional litigation and the risk of a potentially higher exposure at trial. *See, Leger,* 592 F.2d at 1250. Exposing a settling tortfeasor to further litigation and liability would render settlement fruitless – removing the very benefits that a settling tortfeasor would hope to derive from his payment to the plaintiff. *See, Miller,* 887 F.2d at 907. A system which so strongly discourages settlement effectively denies the injured tort victim of timely relief for his injuries and unnecessarily prolongs the dispute at great cost to society.

The Ninth Circuit in *Miller v. Christopher,* 887 F.2d 902 (9th Cir. 1989) followed *Self* and adopted the settlement bar rule after noting the devastating effect of contribution on settlements:

> The effect of [allowing contribution] has been to discourage settlements in joint tort cases, by making it ***impossible*** for one tortfeasor alone to take a release and close the file. . . . No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party. Some reports go so far to say that allowing contribution has made independent settlements impossible. Many of the complaints come from plaintiff's attorneys, who say they can no longer settle case with one tortfeasor . . . It seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to

> prevent discrimination by plaintiffs, or collusion in the suit.

Id. at 907 (emphasis added), *quoting,* 12 U.L.A. 99-100.[1]

The Seventh Circuit in *In the Matter of Oil Spill By the Amoco Cadiz,* 954 F.2d 1279 (7th Cir. 1992) also commented on the inefficiency and futility of allowing post-settlement contribution:

> *Contribution*: Instead of the rush to settle under the no-contribution rule there is competition not to settle – for a settling defendant pays cash with certainty but does not buy peace, and may be called on to pay a full share if the plaintiff wins at trial, while a party going to trial may be able to obtain contribution from another defendant . . . Costs of administering the legal system rise, for courts must apportion damages. The costs of doing this may be steep if the parties cannot agree on who should be responsible . . .
>
> Take this case as an example. Thirteen years have passed since the [accident], almost two of them spent in trials on liability and damages. The record still does not permit a confident assessment of ABS's proportionate fault (if any) . . . We are confident that this case would at last come to an end, but may be not in this century. At all events, why should the judicial system invest so heavily in adjusting accounts

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[1] The quoted passage was from the Commissioner's Comments to the 1955 version of the Uniform Contribution Among Tortfeasors' Act (UCATA), which imposed the settlement bar rule and replaced the 1939 version of the UCATA which permitted post-settlement contribution.

> among wrongdoers? Neither justification for the tort system – compensation of victims and the creation of incentives to take care – would be served by this collateral litigation. Conducting such cases would detract from the time courts have available to handle new claims by deserving persons.

Id. at 1317-18. These comments are not based on mere speculation or conjecture, but the real experiences of states that attempted to implement the original version of the Uniform Contribution Among Tortfeasors Act ("UCATA"), drafted in 1939, which permitted contribution against settling tortfeasors. 12 U.L.A. 99. Those states found this approach extremely discouraging to settlements. *See, Id.* at 99-100 (1975); *Miller,* 887 F.2d at 905. This led the drafters of the UCATA to abandon that approach and adopt the settlement bar rule in the 1955 version of the Act. The overwhelming majority of states have followed the 1955 version of the UCATA and bar contribution against settling tortfeasors.

The panel, however, cavalierly brushed aside these authorities and refused to acknowledge the reality that allowing contribution will greatly impede settlements:

> The injured party is assured of full compensation for his damage (less a deduction for any contributory negligence) and is unaffected by any subsequent action among the joint tortfeasors for contribution . . . Chevron argues that allowing contribution will discourage settlements because the settling party may still face liability to the non-settling defendant for contribution. The deterrent effect on settlements, however, is far from clearly established. . . .

* * *

> Assuming, ***arguendo,*** that rejecting the settlement bar rule has a ***slight*** disincentive effect on settlements, we nevertheless authorize an action for contribution. ***Slip Op.*** at 2120 (emphasis added).

This comment reflects the panel's detachment from the practical ramifications of its decision and an acute insensitivity toward the interests of maritime tort victims. To maritime tort victims such as the widow of Danny Self, settling with at least one of the tortfeasors often offers the only hope of recovering from their tragedy and continuing the litigation against the intransigent non-settling tortfeasor. Unable to settle, a victim or his survivors may end in financial ruin while enduring decades of litigation between the tortfeasors. ***Self's*** adoption of the settlement bar rule appropriately took this reality into account. As ***Self*** correctly recognized, its decision was mandated by the Jones Act and general maritime law whose primary purpose is "to provide quick and full compensation to the injured seaman." ***Self,*** 832 F.2d at 1548.

The panel, however, sacrificed the tort victims' interest in obtaining timely relief, in pursuit its "quest for a just and equitable allocation of damages among tortfeasors." ***Slip Op.*** at 2119. The panel reasoned that absent a right of contribution, plaintiffs may reach irresponsible settlements with the one of the tortfeasors with the result that the non-settling tortfeasors will be "forced to pay for more than their proportionate share of the damages." ***Id.*** It found it intolerable that under ***Self's pro tanto*** settlement bar rule, "[i]t will be the non-settling defendants, not the plaintiff or the settling defendant,

who bear the risk that the plaintiff settled for too little." *Id.* at 2120.

The panel's concerns for the interests of non-settling tortfeasors are clearly unfounded. First, under the ***pro tanto*** settlement bar rule, a settlement which in disproportionately low will not go unchecked. If the settlement does not fairly represent the settling tortfeasor's potential liability, it will be subject to collateral attack by the non-settling tortfeasor and may be set aside by the court as collusive and in bad faith. ***Miller,*** 887 F.2d at 907.[2] Moreover, in a case involving seamen, settlements must be approved by the court, as they were in this case. It is clear therefore that non-settling defendants are adequately protected against disproportionately low or collusive settlements between the plaintiff and the settling defendant. *Id.*

In all events, the approach of allowing contribution against settling tortfeasors has been proven an ineffective tool in preventing irresponsible settlements between the plaintiffs and settling tortfeasors. In abandoning the 1939 version of the UCATA, the drafters noted:

> The idea underlying the 1939 provision was that the plaintiff should not be permitted to release one tortfeasor from his fare [sic] share of liability and mulct another instead, from motives of sympathy or spite, or because it might be

---

[2] In *Miller,* 887 F.2d at 907, the Ninth Circuit barred one settling tortfeasor's contribution claim against another after examining the settling tortfeasor's settlement amount in light of his potential liability to plaintiff and concluded that "the settlement between the plaintiff and the [settling tortfeasor] was in good faith because it was not disproportionate to [his] liability."

> easier to collect from one than from the other; and that the release from contribution affords too much opportunity for collusion between the plaintiff and the released tortfeasor against the one not released. Reports from the state where the Act is adopted appear to agree that it has accomplished nothing in preventing collusion. In most three party cases two parties join hands against the third, and this occurs even when the case goes to trial against both defendants . . . If the plaintiff wishes to discriminate as to the defendants, the 1939 provision does not prevent him from doing so . . . It seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit.

12 U.L.A. 99-100, ***quoted in, Miller,*** 887 F.2d at 907.

Proceeding from the premise that only a good faith settlement bars contribution, the ***pro tanto*** settlement bar rule of ***Self*** places the risk or wisdom of settling versus going to trial on the tortfeasors rather than the innocent victim. The tortfeasor who settles with the plaintiff considers the amount for which he settles to be less than his exposure at trial plus the additional cost of litigation. ***See, Leger,*** 592 F.2d at 1250. The non-settling tortfeasor, on the other hand, knows that he will receive a credit for the settling tortfeasor's payment to the plaintiff. If that amount turns out to be higher than the settling tortfeasor's share of the damages, the non-settling tortfeasor will benefit by paying less than its share. Indeed, he could pay nothing if the settlement amount exceeds the plaintiff's damage award at trial. Conversely,

the non-settling tortfeasor will pay more than its proportionate share if he miscalculates and receives an unfavorable verdict at trial. In either event, the plaintiff ultimately recovers the full measure of his damages, while his ability to settle with at least one tortfeasor remains unencumbered.

This result is entirely consistent with Supreme Court precedent. In ***Edmonds v. Compagnie Generale Transatlantique,*** 443 U.S. 252, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979), the Supreme Court made it clear that allocating liability among joint tortfeasors based on their comparative fault is not justified where it would hinder the tort victim's full and efficient recovery. In ***Edmonds,*** one of the tortfeasors was immune from liability by virtue of the exclusive remedy provisions of the Longshoremen and Harbor Workers Compensation Act (LHWCA), 33 U.S.C.A. § 901, ***et seq.*** The Court held that the other tortfeasor was liable for all of the plaintiff's damages – even though he was only 20% at fault ***and could not seek contribution from the immune tortfeasor.*** The Court reasoned that the inequities engendered by its decision were justified to assure the tort victim's full recovery. ***Id.*** 99 S.Ct. at 2761.

The panel is alone among the circuits in concluding that the Supreme Court's decision in ***United States v. Reliable Transfer Co.,*** 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975) mandates exaltation of the comparative fault rule at the expense of the litigants' ability to settle and the tort victim's prospects of obtaining timely relief. ***See, Miller,*** 887 F.2d at 904 (***Reliable Transfer*** is inapposite because it does not take into account the policy of promoting settlements that the settlement bar rule

is designed to advance). The only direct support presented by the panel for its position is the dicta in ***Donovan v. Robbins,*** 752 F.2d 1170 (7th Cir. 1985), an ERISA case, which the Seventh Circuit declined to follow in its recent maritime decision in the ***Matter of Oil Spill By the Amoco Cadiz,*** 954 F.2d 1279, 1316 (7th Cir. 1992).

In sum, the panel's adoption of the rule allowing contribution against settling tortfeasors represents a dramatic departure from the established law of this Circuit, on a course which no other circuit has elected to follow. The panel felt entitled to decide this issue according to its own preference after characterizing ***Self's*** adoption of the settlement bar rule as dicta. We will not engage in a technical analysis of why the issue of the settlement bar rule was properly before the Court in ***Self.*** Suffice it to say, however, that ***Self's*** adherence to the settlement bar rule was unequivocal. ***Self*** adopted the settlement bar rule after reasoned analysis and in the context of the issues before it. The public in this jurisdiction has placed its reliance on ***Self*** to assume that settlement relieves a settling tortfeasor from further litigation and liability. Indeed, every other court in this country that has been confronted with this issue has considered ***Self*** to represent the binding law of the Eleventh Circuit. To those litigants who have settled in reliance on ***Self,*** it is irrelevant that contribution was not addressed by the district court or the parties' briefs. To them, the panel's action means the devastating prospect of continued litigation and the realization that this Court does not always mean what it says.

As aptly noted by Professor Moore in 1B Moore's Federal Practice § 0.402[2] at P.44:

> [W]hen the appellate court has revealed the direction of its logic by going beyond the precise facts before it to discuss the application of a broader principle what it says . . . stands in the meanwhile as an expression of the court's understanding of the applicable principles . . .

Thus, regardless of the panel's technical characterization of *Self* as ***dicta,*** the justifiable reliance place upon it by the litigants in this jurisdiction cautions against its casual rejection and warrants the full attention of the Court ***en banc.*** This point was best expressed by this Court in its very first opinion in ***Bonner v. City of Prichard, Ala.,*** 661 F.2d 1206, 1209 (11th Cir. 1981):

> Stability and predictability are essential factors in the proper operation of the rule of law . . . [T]he reasons for following past decisions . . . are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication of by eliminating the need to litigate every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Id. at 1209; ***quoting, Moragne v. States Marine Lines, Inc.,*** 398 U.S. 375, 403, 90 S.Ct. 1772, 1789, 26 L.Ed.2d 339 (1970). This Court further noted:

> We tend to think of ***stare decisis*** as "it is decided." The full phrase is ***stare decisis et non quieta movere*** – 'to adhere to precedents and ***not to unsettle things which are established.***' The prospect of decades of writing on a clean slate in pursuit of the possibility that in some

> case or cases we might find a rule we like better . . . is at best unappealing, at worst disastrous.

Id. at 1211. The panel's decision contravenes prior law of this Circuit, and insofar as it establishes a precedent of grave consequence to the public, it involves a question of exceptional importance. *Id.* It should therefore be reconsidered by the Court ***en banc.***

CONCLUSION

For the foregoing reasons, Chevron respectfully requests ***en banc*** rehearing of the panel's decision.

Respectfully submitted,

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By: /s/ B. Boghraty
Babak Boghraty
Florida Bar No. 840890

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct of the foregoing was mailed this 13th day of May, 1992 to DEWEY R. VILLAREAL, JR., ESQ., Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., P.O. Box 1438, Tampa, Florida 33601; ALAN B. VLCEK, ESQ., Sullivan & Vlcek, 12-14 East Bay Street, Suite 3100, Jacksonville, Florida 32202; COURTNEY WILDER STANTON, ESQ., 421 W. Church Street, #212-B, Jacksonville, Florida 32202 and JOHN FUTRELL, ESQ., Faris Ellis Cutrone & Gilmore, 1207 Whitney Building, 228 St. Charles Avenue, New Orleans, Louisiana 70130.

KELLEY DRYE & WARREN

By: /s/ B. Boghraty
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SA.6

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May 13, 1992

VIA FEDERAL EXPRESS

Honorable Miguel J. Cortez, Jr.
Clerk of the Circuit Court of Appeals
for the Eleventh Circuit
56 Forsyth Street N.W.
Atlanta, Georgia 30303

Re: Great Lakes Dredge & Dock Company v. Chevron Shipping Co., et al.

Dear Mr. Cortez:

Pursuant to the Federal Rule of Appellate Procedure 28(j), Chevron Shipping Company hereby submits this

letter of supplemental authority in the above-styled Appeal. Please note that this letter relates to Chevron's Suggestion of Rehearing En Banc filed on May 14, 1992 and should be distributed to all Judges of the Circuit.

The United States Court of Appeals for the Fifth Circuit recently addressed the availability of contribution among two settling tortfeasors in *Hardy v. Gulf Oil Corp.*, 949 F.2d 826 (5th Cir. Jan. 1992). The issue in *Hardy* was virtually identical to that presented on this appeal; namely, whether a tortfeasor who has settled with the plaintiff after trial may sue another tortfeasor who settled with the plaintiff before trial for contribution on the ground that his settlement payment to the plaintiff exceeds his proportionate liability.

The Fifth Circuit held that a settling tortfeasor's contribution claim against another settling tortfeasor is barred for two reasons: (1) because a settling tortfeasor is immune from liability for contribution by virtue of his settlement with the plaintiff; and (2) a tortfeasor who settles is bound by the finality of his settlement and may not sue another tortfeasor for contribution. Id. at 835-36. The Court's reasoning and the language of the opinion supports Chevron's position throughout its Suggestion of Rehearing *en banc* that the rule adopted by the panel's will have grave consequences for litigants in this Circuit and has been castigated by all other circuits which have addressed this issue.

Very truly yours,

KELLEY DRYE & WARREN

/s/ B. Boghraty

cc: All Counsel of Record

SA.7

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 90-3466

GREAT LAKES DREDGE &
DOCK COMPANY,

Plaintiff/Appellant,

vs.

CHEVRON SHIPPING COMPANY,
et al.,

Defendant/Appellees.
_____/

MOTION FOR STAY OF MANDATE

Appellees, CHEVRON SHIPPING COMPANY et al., (hereinafter "CHEVRON") by and through its undersigned attorneys, and pursuant to the Federal Rule of Appellate Procedure 41(b), hereby moves for a stay of the mandate in the above styled appeal, and as grounds therefore, states as follows:

1. CHEVRON filed its Suggestion of Rehearing *En Banc* from this Court's opinion on May 14, 1992.

2. In an Order dated June 23, 1992, this Court denied CHEVRON's Suggestion of Rehearing *En Banc.*

3. The panel's opinion, which holds that a settling tortfeasor may seek contribution against another settling tortfeasor in admiralty, creates a conflict on this issue with other Federal Courts of Appeal.

4. Based on the above, and pursuant to Rule of the Supreme Court of the United States 10(a), the undersigned has commenced preparing a Petition for Writ of Certiorari, which shall be filed pursuant to the applicable Rules of the Supreme Court and F.R.A.P. 41(b).

WHEREFORE, CHEVRON seeks an Order staying the mandate pending CHEVRON's Application for Certiorari and the Supreme Court's disposition of that application.

Respectfully submitted,

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SA.8

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 90-3466

GREAT LAKES DREDGE &
DOCK COMPANY,

Plaintiff/Appellant,

vs.

CHEVRON SHIPPING COMPANY,
et al.,

Defendant/Appellees.
_____/

MOTION FOR RECONSIDERATION OF DENIAL OF APPELLEE'S MOTION FOR STAY OF ISSUANCE OF MANDATE

Appellee, CHEVRON SHIPPING COMPANY, et al., ("Chevron") by and through its undersigned attorneys, and pursuant to Federal Rule of Appellate Procedure 41 and the Eleventh Circuit Appellate Rule 41-1, hereby requests the Court to reconsider its Order denying Chevron's Motion for Stay of Mandate, filed with the Clerk on July 14, 1992. In support of this motion, Chevron submits the following memorandum of law.

MEMORANDUM OF LAW

On June 23, 1992, this Court entered an Order denying Chevron's motion for rehearing from the Court's April 16, 1992 opinion. Thereafter, pursuant to Federal Rule of Appellate Procedure 41, Chevron filed a timely motion for a stay of the mandate pending the filing of

Chevron's petition for writ of certiorari to the United States Supreme Court. A copy of that motion for stay of mandate is attached. No opposition was ever filed; the motion was denied on July 14, 1992.

Chevron is in the process of preparing its petition for writ of certiorari to the Supreme Court. Rule 13.4 of the Supreme Court Rules requires that the petition be submitted no later than September 21, 1992. . . .

* * *

SA.9

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September 17, 1992

Courtney Wilder Stanton, Esq.
421 West Church Street, Suite 212 B
Jacksonville, Florida 32202

Re: Great Lakes Dredge & Dock Co. v.
Chevron Shipping Co., et al.

Dear Mr. Stanton:

We are in receipt of your correspondence of September 11, 1992 wherein you suggest that our Petition for a Writ of Certiorari to the United States Supreme Court is untimely and indicate that Great Lakes Dredge & Dock

Company will seek sanctions against Chevron should it be required to respond to our petition.

While you are welcome to file a motion for sanctions or any other motion you deem appropriate with the United States Supreme Court, we would draw your attention to Rule 35-6 of the Rules of the United States Court of Appeals for the Eleventh Circuit which states:

> "A suggestion of rehearing en banc will also be treated as a petition for rehearing before the original panel."

We would further direct your attention to the Eleventh Circuit's June 23, 1992 order which expressly denies both Chevron's motion for rehearing and motion for rehearing en banc. Finally, we suggest that you contact the appellate docket clerk at the United States Supreme Court who most assuredly will confirm for your, as she did for us earlier this summer, that the operational effect of the Eleventh Circuit's rules and the June 23, 1992 order is to start the 90-day time frame in which a petition for writ of certiorari should be filed on June 23, 1992.

Very truly yours,

KELLEY DRYE & WARREN

/s/ Henry H. Bolz
Henry H. Bolz III

SA.10

* * *

11th Cir. R.35-6 Form of Suggestion. A suggestion of en banc consideration shall be bound in a white cover which is clearly labeled with the title "Suggestion of Rehearing (or Hearing) En Banc". A suggestion of rehearing en banc will also be treated as a petition for rehearing before the original panel. A petition for rehearing will not be treated as a suggestion of rehearing en banc. A suggestion of en banc consideration shall contain the following items in this sequence:

(a) a cover page as described in 11th Cir. R.28-2(a);

(b) a Certificate of Interested Persons and Corporate Disclosure Statement as described in FRAP 26.1 and the accompanying circuit rules;

(c) where the party suggesting en banc consideration is represented by counsel, one or both of the following statements of counsel as applicable:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: [cite specifically the case or cases]

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or

more questions of exceptional importance: [set forth each question in one sentence]

/s/ _____

ATTORNEY OF RECORD FOR

_____

(d) table of contents and citations;

(e) statement of the issue(s) asserted to merit en banc consideration;

(f) statement of the course of proceedings and disposition of the case;

(g) statement of any facts necessary to argument of the issues;

(h) argument and authorities. These shall concern only the issues and shall address specifically not only their merit but why they are contended to be worthy of en banc consideration;

(i) conclusion;

(j) certificate of service.

* * *

11th Cir. R. 35-8 Length. A suggestion of en banc consideration shall not exceed 15 pages, and if made with a petition for rehearing (whether or not they are combined in a single document) the combined documents shall not exceed 15 pages.

* * *

I.O.P. – Suggestions of Rehearing En Banc

1. Time and Form – A suggestion of rehearing en banc whether or not combined with a petition for rehearing is timely only if received by the clerk within 21 days of entry of judgment. Judgment is entered on the opinion filing date. Typewritten suggestions of rehearing en banc in the form prescribed by FRAP Rule 32(a) are acceptable, and printing delays are not therefore considered a basis for requesting an extension of time.

2. Length – A suggestion of rehearing en banc, whether or not filed with a petition for rehearing, is limited to 15 pages, exclusive of items required by Cir. R. 35-6(a), (b), (c), (d), and (j).

. . . .

3. Handling of En Banc Suggestion by the judges –

a. Panel Has Control – Although a copy of the suggestion of rehearing en banc is distributed to each panel judge and every active judge of the court, the filing of a suggestion of rehearing en banc does not take the case out of plenary control of the panel deciding the case. The panel may, on its own, grant rehearing by the panel and may do so without action by the full court. Rehearing en banc may only be granted by affirmative vote of a majority of circuit judges in regular active service, as hereinafter provided.

b. Requesting a Poll – Within 10 days of the date of mailing to the judge by the clerk, any active Eleventh Circuit judge may notify the writing judge (the senior active Eleventh Circuit judge on the panel if the writing judge is a non-active member) that the judge desires the case be reheard en banc. At the same time the judge may notify the clerk to withhold the

mandate. This is also notice that in the event the panel declines to grant rehearing an en banc poll is desired.

If the panel, after such notice, concludes not to grant the rehearing it notifies the chief judge of that fact and the chief judge then polls the court by written ballot on whether rehearing en banc should be granted.

* * *

SA.11

SAMPLE SETTLEMENT DOCUMENT LANGUAGE*

We specifically reserve at this time any rights we might have arising out of the subject matter of this Release against any parties other than the Released Parties, including without limitation Hawkins Sandblasting, Inc., (hereinafter "Other Parties"). We specifically agree, however, that if we ever assert any claim against any such Other Parties, the claims against such Other Parties will only be for the portion of damages for which such Other Parties might be responsible as a result of the proportionate negligence or other fault of those Other Parties, and we agree that we shall not be entitled to assert any claim against any such Other Parties for any portion of claimed damages which in any way result from any claimed negligence or fault on behalf of the Released Parties. We specifically agree that we will assert no claim against any such Other Parties which would give said Other Parties any right of contribution against the Released Parties or any of them. We further agree to advise any such Other Parties of this settlement and to provide such Other Parties with a copy of this release and indemnity agreement. We also agree to notify the Released Parties immediately of any assertion by us of any claim against any such Other Parties.

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* *Gregory C. English, et ux. v. Jacksonville Shipyards, Inc.*, Fla. 4th Cir., Civil Action 89-22206, Div. CV-L, settlement bound February 21, 1992.